

No. 14836

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

ELMER G. COFFEY and MRS. ELMER G.
COFFEY, Husband and Wife,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for
the Eastern District of Washington, Southern
Division

No. 930

ELMER G. COFFEY and MRS. ELMER G.
COFFEY, Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

COMPLAINT

Come Now the Plaintiffs, and for cause of action
allege:

I.

That this action arises under Title 28, United
States Code, Section 1346 (b) as hereinafter more
fully appears.

II.

That the plaintiffs are now and at all times herein
mentioned were husband and wife, and as such con-
stitute a marital community under the laws of the
State of Washington and that they reside in Benton
City, Benton County, Washington, in the Eastern
District of Washington, Southern Division.

III.

That commencing in 1943 and thereafter the De-
partment of the Navy caused to be operated a prac-
tice bombing field near Richland, Benton County,
Washington and that Naval Personnel caused to be

used thereon certain types of practice bombs known as Mark 19, Mod. 1, which were loaded with a miniature practice bomb signal, AN-Mark 4, containing a blank No. 10 gauge shot-gun shell, extra length. That said object had no markings thereon, and appeared to be a piece of lead approximately 8 inches in length and 3 inches in diameter with a hole running through the middle.

IV.

That at a time unknown to this plaintiff the personnel of the Department of the Navy caused said bomb to be dropped in an area approximately 3 to 4 miles west of Benton City, on the shoulder of the road at the place known as the Waggoner Ranch where said instrument lay near a gulley.

V.

That the personnel of the Department of the Navy also caused to be dropped in and around the location hereinabove referred to numerous other objects of this same type, some of which exploded upon contact with the ground and several of which did not.

VI.

That these plaintiffs moved to a farm near Benton City during the year 1950 and that said farm was approximately 1 mile from the Waggoner Ranch hereinabove referred to.

That in the fall, 1951, one O. W. Osborne and one A. J. Osborne were guests at the ranch of the plaintiffs and in the course of walking through the area

came upon the bomb hereinabove mentioned, and the same being unmarked without any identification of its true nature was, by them, transported to the plaintiff, Elmer G. Coffey.

VII.

That on or about the 14th day of February, 1953, the plaintiff, Elmer J. Coffey, was examining said object and preparing to use the metal therein; that this plaintiff had no knowledge of the true nature of the object nor did he know of any facts which would reasonably lead him to know its nature, and he attempted to clean the hole running through the cylinder. That suddenly and without any warning whatsoever, the object exploded with great force while this plaintiff was holding the same.

VIII.

That as a direct and proximate result of said explosion, this plaintiff sustained a traumatic amputation of the left thumb, a compound fracture dislocation of the left first metacarpal and multiple lacerations of the left hand. That said injury is permanent and the plaintiff is presently suffering from limitation of both flexion and extension of the left index finger, and cannot use the left hand to full capacity. That said disability is a permanent disability of 75% of the use of the hand and will ever remain so.

IX.

That the disability to this plaintiff as above alleged hinders this plaintiff in his work in oper-

ating the farm and his work as a pharmacist; that he is unable to do the ordinary farm jobs such as tying knots, twisting wire, holding nails, changing tools, tightening bolts, repairing equipment, performing functions related to raising of sheep and other animals, making hay, carrying objects, and in addition at the time of the explosion suffered severe pain and shock and to the present time continues to suffer pain at the site of the injury.

X.

That as a direct and proximate result of said injury, the Plaintiff has incurred medical expenses in the amount of \$240.60, and will incur future medical expenses in the estimated amount of \$500.00, being a total in all of \$740.60.

XI.

That in addition thereto the plaintiff has actually paid out the reasonable sum of \$550.00 for assistance in carrying on the ordinary activities because of his failure to operate his farm properly and has sustained a loss of \$1,070.00 profits since the time of the injury and will continue to sustain a loss of at least \$1,000.00 a year hereafter.

XII.

That prior to said injury, the plaintiff, Elmer G. Coffey, was an able-bodied man, 47 years of age, with a life expectancy of 23.65 years, and that as a result of said loss of profits and earning capacity, this plaintiff has been damaged in the amount of \$23,650.00.

XIII.

That by reason of the severe pain and suffering, mental anguish and nervous shock, this plaintiff has been damaged in the amount of \$30,000.00.

XIV.

That the injuries to the plaintiff hereinabove described were solely and proximately caused by the negligence of the personnel of the Department of the Navy of the United States of America in the following particulars:

A. Failure to mark said practice bomb with any signs or indications which would warn persons who might come in contact therewith.

B. Dropping a practice bomb containing explosives harmful to persons who might come in contact therewith.

C. That said personnel were negligent in so constructing and using a bomb that the same would not explode upon dropping, striking the ground.

D. That said personnel were negligent in dropping said practice bomb in an area outside any practice range.

E. That said personnel were negligent in failing to warn and advise the public of the existence and potential danger of said practice bomb when said personnel knew or should have known of previous injuries and death resulting from persons coming in contact with said practice bombs.

F. That said personnel were negligent in permitting said practice bomb to appear in the shape and form resembling a weight and appearing to be harmless and attractive to persons coming upon the same.

G. In failing to keep all explosives under lock and key and to adequately post with red signs, clearly marking the dangerous quality thereof.

H. In permitting a dangerous instrumentality to be generally distributed among the public.

I. That said personnel were negligent in failing to clean up the area and remove all practice bombs which were still harmful.

XV.

That the negligence above set forth was solely caused by the conduct of agents and employees of the Department of the Navy, United States of America, and occurred while said personnel were acting within the scope of their authority and in the line of active duty.

XVI.

That under the circumstances hereinabove alleged, the said personnel, if they were private persons, would be liable to the plaintiff for his injury and damages resulting from said occurrence.

XVII.

That the sum claimed herein is in excess of \$1,000.00 and it is not necessary to present a claim in writing to the Department of the Navy.

Wherefore Plaintiff Demands Judgment against the Defendant in the total sum of \$56,010.60, together with the costs and disbursements incurred in this action, and such reasonable attorney fees as the court may award in the premises as provided by law.

MOULTON, POWELL, GESS &
LONEY,

By /s/ DEAN W. LONEY,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed June 17, 1954.

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSES

Comes now the defendant by William B. Bantz, United States Attorney for the Eastern District of Washington, and William M. Tugman, Assistant United States Attorney for said District, and in answer to the complaint of the plaintiffs admits, denies, and alleges as follows:

I.

The defendant admits the allegations contained in paragraphs I and II of the plaintiffs' complaint.

II.

The defendant denies each and every other allegation and thing contained in plaintiffs' complaint

and especially denies that the plaintiffs were damaged in the sum of \$56,010.60 or any other sum.

First Affirmative Defense

That there was no negligence or act of negligence or carelessness on the part of the defendant United States of America, or any of its servants or agents.

Second Affirmative Defense

That the plaintiff was guilty of negligence.

Wherefore, defendant prays that the complaint of the plaintiffs be dismissed and that the defendant have its costs and disbursements herein.

/s/ WILLIAM B. BANTZ,
United States Attorney;

/s/ WILLIAM M. TUGMAN,
Assistant U. S. Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 14, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on regularly in its order to be heard before the Honorable Sam Driver, District Judge, and the plaintiffs appearing in person and being represented by their counsel of record and the defendant appearing by the Honor-

able William Tugman, Assistant United States Attorney, and evidence having been presented by and on behalf of the parties and the Court having considered the argument of counsel and being duly and fully advised in the premises,

Now Therefore makes the following Findings of Fact:

I.

That this is an action brought by the plaintiffs seeking damages for personal injuries sustained by the plaintiff, Elmer G. Coffey, which action is maintained against the United States of America and arises under title 28, United States Code, Section 1346 (b).

II.

That the plaintiffs are now and at all times herein mentioned were husband and wife, and as such constitute a marital community under the laws of the State of Washington and that they reside in Benton City, Benton County, Washington, in the Eastern District of Washington, Southern Division.

III.

That the plaintiffs during the year 1950 moved from Seattle, Washington, to a farm in Benton County, Washington, near Benton City, Washington, which farm was approximately one mile from that certain farm known and described as the Waggoner Ranch. That said Waggoner Ranch was joined to that certain ranch known as the Livengood Ranch with a gully running between the said farms.

IV.

That in the fall of 1951, one O. W. Osborne and A. J. Osborne were guests at the farm of the plaintiffs and while hunting in and about the gulley separating the Livengood Ranch and the Waggoner Ranch with the permission of the owners of said property, the said O. W. Osborne and A. J. Osborne discovered two objects in and upon the ground, which objects appeared to be made of lead approximately eight inches in length and two to three inches in diameter, which objects were delivered to the plaintiff, Elmer G. Coffey.

V.

That on or about the 14th day of February, 1953, the plaintiff Elmer G. Coffey preparing to use said object, attempted to remove the dirt, rocks and debris clogging the hole running through said object when suddenly without warning, said object exploded with great force while this plaintiff was holding the same.

VI.

That as a direct and proximate result of said explosion, the said plaintiff sustained a traumatic amputation of the left thumb, a compound fracture dislocation of the left first metacarpal, multiple lacerations of the left hand and complete atrophy or loss of the first dorsal interosseous muscle lying partly on the first metacarpal and partly on the second metacarpal. As a result the plaintiff has sustained a permanent disability to the left thumb and left index finger.

VII.

That the object which exploded was a thirteen pound practice bomb belonging to the United States Armed Forces and designated as a Mark 19, Mod. 1 loaded with miniature practice bomb signal AN-Mark 4, containing a Blank No. 10 gauge shotgun shell, extra length. That said object was used exclusively by the Department of the Navy and the Department of the Army.

VIII.

That the plaintiff, Elmer G. Coffey had no knowledge of the nature or condition of said object and to a reasonably prudent person, said object would appear to be harmless in nature and condition.

IX.

That at a time prior to 1951, the United States Armed Forces caused this object as well as numerous other objects to be dropped in this general area between three and four acres in extent which objects were dropped from a military aircraft, said property being at all times herein mentioned private property and said United States Armed Forces not being authorized to use said property as a practice target or bombing range.

X.

That the officers and agents of the United States of America were negligent in the following particulars:

A. Failure to mark said practice bomb with any signs or indications which would reasonably warn

persons who might come in contact therewith of the dangerous qualities of said object.

B. That said personnel were negligent in dropping a practice bomb in such an area with said bomb being constructed in such a manner that the tail fin would readily become detached and said object would then appear to be harmless in nature and show no indication of the fact that it was a bomb.

C. That said personnel were negligent in dropping said practice bomb in the area herein described, being outside any authorized practice range.

XI.

That the negligence hereinabove set forth was solely caused by the conduct of the agents and employees of the Military Services of the United States of America and occurred while said personnel were acting within the scope of their authority and in the line of active duty and under the circumstances, the United States, if a private person, would be liable to the plaintiff, Elmer G. Coffey, for his injuries and damage resulting therefrom.

XII.

That the negligence of said personnel was the direct and proximate cause of the injuries hereinabove set forth sustained by the plaintiff Elmer G. Coffey, who immediately prior to said injury was an able bodied man, 47 years of age with a life expectancy of 23.65 years.

XIII.

That as a direct and proximate result of said negligence, the plaintiff has incurred medical expenses in the amount of \$240.60.

XIV.

That as a direct and proximate result of the negligence of said personnel, the plaintiff Elmer G. Coffey by reason of pain and suffering and permanent disability, loss of earning, mental anguish and future medical expenses, has been damaged in the total sum of \$8,500.00.

From the foregoing Findings of Fact, the Court now concludes as a matter of law:

1. That the plaintiff Elmer G. Coffey is entitled to have and recover judgment against the defendant in the sum of \$8,500.00 together with the sum of \$240.60 for medical expenses incurred and the plaintiff's costs and disbursements incurred by plaintiff herein.

Entered by the Court this 4th day of March, 1955.

/s/ SAM M. DRIVER,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 4, 1955.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division

No. 930

ELMER G. COFFEY and MRS. ELMER G.
COFFEY, Husband and Wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This Matter having come on regularly in its order to be heard in the above-entitled Court before the Honorable Sam Driver, District Judge, and after trial of the action being had and decision of the Court rendered and having heretofore made and entered Findings of Fact and Conclusions of Law and being duly and fully advised in the premises,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed That the plaintiff Elmer G. Coffey be and he hereby is awarded judgment against the defendant in the total sum of \$8,740.60, together with interest thereon at the rate of four ~~six~~ per cent per annum from and after the date hereof and for the further sum of plaintiff's costs and disbursements incurred herein.

Done and entered by the Court this 4th day of March, 1955.

/s/ SAM M. DRIVER,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 4, 1955.

[Title of District Court and Cause.]

ORDER

This matter having come on regularly to be heard before the Court upon the stipulation of the parties agreeing that the judgment heretofore entered in this matter on the 4th day of March, 1955, be amended so that interest on the judgment awarded to plaintiff draw interest at four per cent instead of six per cent, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the second paragraph of said judgment be amended to read as follows:

“Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff Elmer G. Coffey be and he hereby is awarded judgment against the defendant in the total sum of \$8,740.60, together with interest thereon at the rate of four per cent per annum from and after the date hereof and for the further sum of plaintiff's costs and disbursements incurred herein.”

Dated this 5th day of April, 1955.

/s/ SAM M. DRIVER,

United States District Judge.

Approved:

/s/ DEAN W. LONEY,

Attorneys for Plaintiff.

Presented by:

/s/ WILLIAM M. TUGMAN,

Assistant U. S. Attorney.

[Endorsed]: Filed April 5, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, the defendant above named, by William B. Bantz, United States Attorney for the Eastern District of Washington, and William M. Tugman, Assistant United States Attorney for said District, does hereby appeal to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 4th day of March, 1955.

Dated this 2nd day of May, 1955.

/s/ WILLIAM B. BANTZ,
United States Attorney;

/s/ WILLIAM M. TUGMAN,
Assistant U. S. Attorney.

Affidavit of mail attached.

[Endorsed]: Filed May 2, 1955.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter having come on before the above-entitled Court on the 4th day of March, 1955, on the defendant's motion for a new trial, and the Court having heard the arguments of counsel and being fully advised in the premises, it is

Ordered that the defendant's motion for a new trial be, and hereby is, denied.

Dated this 13th day of July, 1955.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ WILLIAM M. TUGMAN,

Assistant U. S. Attorney.

[Endorsed]: Filed July 13, 1955.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division

Civil No. 930

ELMER G. COFFEY and MRS ELMER G.
COFFEY, Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above-entitled cause came on for trial at Walla Walla, Washington, on Monday, February 28, 1955, before the Honorable Sam M. Driver, Judge of the above-entitled Court, sitting without a jury; the plaintiffs being represented by Dean W. Loney, appearing for Moulton, Powell & Loney, their attorneys; the defendant be-

ing represented by William M. Tugman, Assistant United States Attorney;

Whereupon, the following proceedings were had, to wit: [1*]

Walla Walla, Washington—February 28, 1955

The Court: Are you ready, gentlemen, in Coffey and wife against the United States?

Mr. Loney: Yes, your Honor.

Mr. Tugman: Yes, your Honor.

The Court: You may proceed, then.

Mr. Loney: I would like to call Mr. Osborne to the stand, if your Honor please.

The Court: All right.

OLIVER OSBORNE

called and sworn as a witness on behalf of the plaintiffs, was examined, and testified as follows:

Direct Examination

By Mr. Loney:

Q. Will you state your name, please?

A. Oliver Osborne.

Q. Mr. Osborne, where do you reside?

A. 13417 First Southwest, Seattle.

Q. And what is your occupation?

A. Operating engineer.

Q. Are you related to Mr. and Mrs. Elmer Coffey?

A. Yes, Mrs. Coffey is my sister. [2]

Q. Do you know where Mr. Coffey now resides?

A. Yes.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Oliver Osborne.)

Q. Near Benton City, Washington. And you are familiar with his farm, having been out to it on occasion? A. Yes.

The Court: I didn't get where he lives.

A. 13417 First——

The Court: No, I mean the plaintiff, your brother-in-law.

A. Oh.

Mr. Loney: Near Benton City, Washington.

The Court: Oh, yes.

Q. (By Mr. Loney): Did you have occasion to visit Mr. Coffey's farm off and on during, say, from 1945 on?

A. No, it wouldn't have been 1945.

Q. Later than that?

A. It would have been later than '50, I believe.

Q. Well, you visited him after he purchased the farm there? A. Yes.

Q. And moved there, is that correct?

A. Yes.

Q. Did you have occasion to go around on adjoining land and do any hunting?

A. Yes, during the hunting season. [3]

Mr. Loney: I wonder if this might be marked, if your Honor please?

The Court: All right.

The Clerk: That will be Plaintiff's Exhibit 1 for identification.

Mr. Loney: May I address your Honor?

The Court: Yes.

Mr. Loney: Concerning this, I obtained this from Mr. Tugman and we are not sure of its iden-

(Testimony of Oliver Osborne.)

tification, but we would like to introduce it for the purpose of illustration and let Mr. Tugman's witness later identify what has been done to it, what may be changed, if anything.

The Court: Yes, all right. Is that acceptable?

Mr. Tugman: That is acceptable.

Q. (By Mr. Loney): Showing you what has been marked as Plaintiff's Exhibit 1 for identification——

Mr. Loney: May I hand it to him?

The Court: Yes, go ahead.

Q. (By Mr. Loney): ——would you tell me if you have seen anything similar to that?

A. Yes, I have.

Q. Did you have occasion to find either that object or something similar to it? A. Yes.

Q. Near Benton City? Can you tell me what you were doing [4] at the time you found them?

A. We were bird hunting in the Benton City district near my brother-in-law's farm.

Q. Do you know roughly about where you were when you saw them?

A. Oh, somewhere about three and a half, four miles, west of Benton City, probably. I don't know exact mileage.

Q. Do you know about how far you were from Mr. Coffey's farm?

A. Oh, probably a mile and a half, two miles.

Q. Had you walked from his place or had you driven a car?

A. Well, I don't remember just exactly. You

(Testimony of Oliver Osborne.)

ordinarily would be walking when you are bird hunting.

Q. Can you describe, oh, the land that you were walking on, the kind of terrain you were on?

A. Rough, hilly terrain, I would say.

Q. Rocky? A. Fairly rocky, yes.

Q. Was it being farmed around here?

A. Yes.

Q. Were you on level land or in the gulley or depression, or just what?

A. As I remember, it was in a gulley, weedy draw.

Q. Was someone with you at the time? [5]

A. Yes, my brother.

Q. And is he here today? A. Yes.

Q. Do you recall which one of you gentlemen discovered the object? A. No.

Q. When you did discover it, what did you do?

A. Well, we first thought—discovered it was lead, take it to Elmer, or Mr. Coffey, being as he poured a lot of bullets; made a lot of his own bullets for molding.

Q. Were you aware at that time that this object was lead?

A. Yes, as near as you could tell. By scratching the corrosion off of it with his finger nail, see, it resembled lead.

Q. Would you mind testing your finger nail on this and determine if you can scratch it?

A. Get the dirt off of it, see it wasn't rock, it is metal.

(Testimony of Oliver Osborne.)

Q. You can, by use of your finger nail, disclose a shiny substance? A. Yes.

Q. Were you on any kind of an area that had any particular signs that it either belonged to the government or had belonged to the government?

A. No. [6]

Q. Were there any warning signs of any nature indicating the presence of a bombing or target range? A. No.

Q. So far as you know, has that area ever been a bombing range?

A. Not as far as I know.

Q. How many of these objects did you find?

A. Two.

Q. How were they laying? Did they have dirt around them?

A. Partially covered with dirt.

Q. And what did you do after you and your brother took them into your possession?

A. As near as I recall, we carried them back to Coffey's.

Q. And handed them to him?

A. I don't recall, handing them to him or throwing them down on the ground, whichever it was. He made the remark, "Well, thanks, fellows, for bringing the lead," or something to that effect.

Q. Do you know about the time that this occurred, about the year?

A. It must have been in the fall of '51. I don't recall the exact year.

Q. Were there any indications of a fin that you

(Testimony of Oliver Osborne.)

might expect on a bomb? A. No. [7]

Q. Any kind of metal indicating a fin around or on it at the time you picked it up? A. No.

Q. Did you have any knowledge as to what this object was? A. No.

Q. Did you see any indications on the object that there *might an* explosive of any kind in it?

A. No.

Q. Before you picked that up, had you ever seen an object like that before? A. No.

Q. I believe that on your deposition you made mention of the fact that you had been on the Zillah Bombing Range?

A. I don't believe I said I had been on it. I had been near it.

Q. Oh. Are you familiar with its location?

A. Not too much.

Q. Well, do you know roughly? Is it any place close to where you found these objects?

A. I wouldn't think so.

Q. Did you know anything about the existence of a bombing range immediately north and west of Richland? A. No.

Q. Do you know anything about that today? [8]

A. No.

Q. Do you know whether or not you were close to the Yakima River at the time you found these objects? A. Yes, you could see the river.

Q. Do you know roughly how far you were from it? A. Possibly a mile.

Q. You would be a mile to the north of the river?

(Testimony of Oliver Osborne.)

A. Yes.

Q. Still in Benton County, is that correct?

A. Yes.

The Court: A mile north of the Yakima River?

A. Yes.

Q. (By Mr. Loney): Was the bomb or the object in this condition when you found it as far as cleanliness is concerned? A. No.

Q. What difference did it have on it?

A. It was dirty.

Q. Do you recall whether or not there now appear to be two holes or a hole leading all the way through the object, is that correct?

A. It appears there, it is there now. It didn't appear that way when we found it.

Q. At the time you found it, were you able to discover the existence of a shotgun shell? [9]

A. No.

Q. Or anything of that nature in it. Do you recall the condition of each end of this hole running through it? A. No, I wouldn't recall that.

Q. You recall the time that Mr. Coffey had his accident? A. Yes.

Q. Between the time that you found these objects and the time that Mr. Coffey had his accident, did you have any other knowledge about these objects or have any other connection with them at any time? A. No.

Q. When was the first time that you learned that there might be an explosive of any kind in that object?

(Testimony of Oliver Osborne.)

A. When I came to his place the same day of his accident, was the first I knew of any explosive in it.

Q. Was that before or after the accident?

A. That was immediately after the accident.

Q. Are you familiar with any type of bombs?

A. No.

Q. Have you ever run across them any place in your hunting or travelings? A. No.

Mr. Loney: I have no further questions, your Honor.

The Court: All right, you may cross-examine.

Mr. Tugman: I didn't quite hear him. [10]

The Court: Yes, he said he had no further questions.

Cross-Examination

By Mr. Tugman:

Q. Mr. Osborne, is this object here in the same condition now as it was when you first found it?

A. No.

Q. How does it differ?

A. It has the hole clear through it and it is much cleaner.

Q. Which end was the hole through when you first found it? Would you look at it?

The Court: This, I understand, isn't one of the two found; it is something similar to it; isn't that correct?

A. Well, it is similar.

Mr. Loney: If it please your Honor, I under-

(Testimony of Oliver Osborne.)

stand that after the accident, some personnel from the Naval service came out and took the object that caused the explosion, and I understand that this is the object; is that correct?

Mr. Tugman: I understand that it is.

The Court: Oh, this is the one. It wasn't broken apart then, it blew out through the end there?

Mr. Loney: Yes, your Honor.

The Court: Oh, I see. Well, that is the same one, [11] then.

Mr. Tugman: We can show that at a later time, your Honor.

The Court: I see, all right.

Q. (By Mr. Tugman): Would you please tell which end the hole was through?

A. There wasn't any hole through it when we found it.

Q. You said there was a hole in it. Which end?

A. Well, I couldn't tell you.

Q. You don't remember whether it was the large end or the tapered end?

A. No, I couldn't say.

Q. Now, what type of material was around the outside of that?

A. Sandy dirt, was as much as I could tell you.

Q. I see. How much of that did you rub off?

A. Well, not any more than what you could take off with a thumb nail to discover that it was metal.

Q. I see. Now, are there any other changes in that condition of that bomb from the time you first saw it?

(Testimony of Oliver Osborne.)

A. Well, I couldn't say that, either, because it is vague.

Q. Is it smaller now than it was at the time that you first picked it up.

A. Well, I couldn't say.

Q. Is part of it missing on one end? [12]

A. It wouldn't be safe for me to say that. I don't remember exactly what it looked like.

Q. In other words, you just don't remember what the thing looked like when you first picked it up?

A. Because it was dirty. Didn't look like this because it wasn't this clean.

Q. I see. Did it weigh more or less than it does now, or——

A. I couldn't tell you that, either.

Q. And you don't remember which end the hole went through at all?

A. No, I couldn't recall that.

Q. Did you look into the end that had the hole?

A. I didn't examine it, no.

Q. In other words, you just picked it up and found it was lead and took it to Coffey?

A. That's right.

Q. And that is all the further interest you had in it?

A. Yes.

Q. So you didn't make any examination at all to try and determine what the nature of the object was, is that correct?

A. That's right.

Mr. Tugman: I have no further questions.

(Testimony of Oliver Osborne.)

A. If I had known it was a bomb, I would never have [13] touched it, that is for sure.

The Court: Any further questions?

Mr. Loney: May this be marked?

The Clerk: I think maybe a sticker would work best on that.

The Court: All right.

The Clerk: That will be Plaintiff's Exhibit 2 for identification.

Mr. Loney: With your Honor's permission, I would like to show this to the witness for the purpose of illustration.

The Court: All right.

Redirect Examination

By Mr. Loney:

Q. I am showing you what has been marked as Exhibit 2 for identification. I want you to observe the end of that object that appears to remain intact, and I will ask you if that appears to be open or closed, that hole?

A. Well, I would say it was closed with the dirt and rock that is there.

Q. Has that any relationship to the way this other object looked when you found it?

A. Similar, yes.

Q. Mr. Tugman mentioned that you said there was a hole. [14] Did you say there was a hole in it?

A. I don't recall saying there was a hole in it.

Q. Was there any way that you could see into the object, as you recall?

A. No.

(Testimony of Oliver Osborne.)

Q. Is there some other indication of the fact that this object is lead other than just scratching it? Can you tell by, for example, the weight of it?

A. Well, the weight would give you the indication of it being lead, yes.

Mr. Loney: May I hand this to your Honor? Would you like to see it?

The Court: Yes.

(Exhibit 2 handed to Court.)

Mr. Loney: I have no further questions.

Recross-Examination

By Mr. Tugman:

Q. Mr. Osborne, you did say there was a hole in it at one end?

A. Resembling a hole, probably, because it would be full of what we thought was dirt.

Q. What you thought was dirt? A. Yes.

Q. Now, in your deposition, you mentioned that there was [15] corrosion inside this hole. What did you mean by that?

A. I beg your pardon, I don't believe I stated that.

Q. Didn't you state that there was some corrosion in there that didn't look natural to lead or to an object of the type you found?

A. Would you repeat the question?

Q. Didn't you state that there was some corroded matter in there that didn't look natural to a pipe or an object of that kind?

(Testimony of Oliver Osborne.)

A. I say it was dirt, yes, resembled dirt.

Q. What did you mean in your deposition when you stated that there was corrosion in there?

A. I believe that is my brother's statement, not mine.

Q. It couldn't have been anything that looked like corroded metal in there, could there, that might have looked like dirt? A. I don't think so.

Q. The dirt, and so on, inside this bomb was pretty much the same color as the bomb itself, was it not? A. Pretty much.

Q. Well, how deeply could you see into this hole? A. Very shallow.

Q. How deeply could you see? A half an inch?

A. Possibly.

Q. How far into the end of this (indicating)?

A. Oh, possibly a quarter of an inch, maybe half inch.

Q. Would you please——

Mr. Tugman: I wonder if we have something that he could mark how far in the bomb he could see?

A. Well, that has been too far back to make a statement on it.

Q. Would you look at that and say just how far you could see? You said about a half an inch or maybe three-quarters of an inch, or how far in could you see?

A. Very shallow, possibly like that one that was there.

Q. Well, that is not a half inch or anything like

(Testimony of Oliver Osborne.)

that. There was enough of an opening there, at any rate, so that you could see in, is that correct?

A. No, I wouldn't say that.

Q. What did you mean in your deposition, then, when you said you could look into the hole and see corroded matter in there?

A. I believe that was my brother's statement.

Q. Well, did you notice anything that looked like corroded matter in there?

A. Not that I can say.

Mr. Loney: Perhaps, your Honor, if Mr. Tugman has something in the deposition, he could point it out specifically.

The Court: Yes, that is the proper way to examine, [17] if you want to question his prior statement or compare it to his testimony.

Q. (By Mr. Tugman): Did you talk about this object when you found it at all? Was there any conversation between you and your brother?

A. I don't recall the conversation.

Q. Now, in the immediate area where you found this bomb, did you find any other objects metal objects, at all?

A. No.

Q. You didn't say that you found another bomb?

A. We found two of them, similar.

Q. How far apart were they?

A. Well, I don't recall exact distance.

Q. Were they both lead?

A. Close, yes.

Q. How far apart were they?

A. Oh——

The Court: Approximately, if you know.

(Testimony of Oliver Osborne.)

A. Approximately five or six feet.

Q. (By Mr. Tugman): I see. What did you do with the second bomb?

A. I don't know what became of it.

Q. Did you take it back to Mr. Coffey?

A. Pardon?

Q. Did you take it back to Mr. Coffey? [18]

A. We took both of them to him.

Q. What did you think this object was when you found it? A. A piece of lead.

Q. What nature of a piece of lead? I mean, any particular item?

A. I never seen anything like them before.

Q. I see. Then, you didn't really think it was anything at all, just a piece of lead that was out there, a stray piece of lead, is that right?

A. Yes, sir.

Mr. Tugman: I have no further questions.

The Court: Do you have anything else, Mr. Loney?

Mr. Loney: No, your Honor.

The Court: There is just this, I am not sure I got your testimony about where you found this object. Was it in an open country about a mile north of the Yakima River, you said?

A. Yes, fairly open country.

The Court: Was it fenced in?

A. Yes.

The Court: In a fenced enclosure?

A. Yes.

(Testimony of Oliver Osborne.)

The Court: And did you know who the land belonged to?

A. Yes, we had permission to hunt on it. [19]

The Court: Oh, I see. It was private property, then, owned by someone who had given you permission to hunt there?

A. Yes, sir.

The Court: That is all the questions I have.

Mr. Loney: Your Honor, I brought over some colored slides of the particular area and I would like to identify them by this gentleman, if I can. I was going to wait until I could get a viewer at lunchtime, which I will do, but I would like to identify them, if I may.

The Court: All right.

The Clerk: Plaintiff's Exhibit 3 for identification, Plaintiff's 4 for identification, and Plaintiff's 5 for identification.

Mr. Loney: I realize it is rather hard to make these out.

Redirect Examination

By Mr. Loney:

Q. Would you examine this, Mr. Osborne, and see if that looks somewhat like the location of where the objects were found?

A. Yes, that looks like the country.

Q. You observe what appears to be a ravine or a gulley in about the center of the picture [20] there?

A. Yes.

Mr. Tugman: I might ask, Mr. Loney, is he

(Testimony of Oliver Osborne.)

going to qualify these exhibits for who took them, when and where?

Mr. Loney: Well, if you have any objection along that line, I took them myself from a place that was pointed out to me as being the location.

The Court: I think if you can establish the time and then have this witness say that they are a fair and accurate representation of the terrain at the time of this incident, that that would be sufficient to identify them.

Mr. Tugman: Well, all right, your Honor.

Mr. Loney: If your Honor please, will you accept my statement on that, counsel? To the best of my recollection, they were taken sometime in August.

Mr. Tugman: Certainly.

The Court: All right. August of this year?

Mr. Loney: Last year.

The Court: Last year, that would be 1954.

Q. (By Mr. Loney): Now, as far as the vegetation and the growth around there, is there any way you can tell whether that was similar, recalling these were taken now in '54? Can you tell whether or not that is similar to the way it looked?

A. I would say it was similar to the terrain when we were hunting. [21]

Q. It appears to be an orchard there along part of that? A. Yes.

Q. Was that orchard there at that time?

A. Yes, I'm sure it was.

The Court: Have you seen these enlarged and on a screen, Mr. Osborne?

(Testimony of Oliver Osborne.)

A. No.

Mr. Loney: This is the first time he has seen them.

The Court: I see. You are just looking at the original?

A. Uh-huh.

Mr. Loney: Before I introduce them, I think I would prefer to have some way of enlarging them.

Q. Would you mind looking at Plaintiff's Exhibits 4 and 5? Just examine them and see—You should look at the back side, this way (indicating) and that will give you the proper perspective.

Examining No. 4 there, can you see the river, the Yakima River, in the foreground, or not?

A. No, I can't detect it.

Q. I guess you can't. Examining No. 5, can you make any heads or tails out of that?

A. Well, it looks similar to the terrain, the same as the other.

Mr. Loney: If I may introduce these after lunch, [22] counsel. Do you wish to examine them now?

The Court: Have you seen them?

Mr. Tugman: No, I haven't.

The Court: Would you like to look at them?

Mr. Tugman: Not at this moment. I will want to look at them a little later.

Mr. Loney: That is all the questions I have.

The Court: If there are no other questions, you may step down.

(Witness excused.)

Mr. Loney: Mr. Osborne.

ALBERT J. OSBORNE

called and sworn as a witness on behalf of the plaintiffs, was examined and testified as follows:

Direct Examination

By Mr. Loney:

Q. Your name, Mr. Osborne, is A. J. Osborne?

A. Albert J., yes.

Q. And your residence is Seattle, Washington?

A. 13417 First Avenue Southwest.

Q. And you are the brother of Mrs. Coffey and Mr. Oliver Osborne who testified?

A. That's right.

Q. You heard his testimony here in court this morning? [23]

A. Yes, most of it.

Q. Do you recall finding an object similar to this object that has been marked as Identification 1?

A. Yes, I do.

Q. Would you state whether or not that object now appears to be in the same condition or different condition than the object was when you found it?

A. Well, it looks similar, but, of course, it is much cleaner and it doesn't have the general appearance now that it did when we found it, although it is about the size. I think we found two at the same time.

Q. Do you recall whether or not there was a hole in the object?

A. No, I don't, I don't recall.

(Testimony of Albert J. Osborne.)

Q. Do you recall whether or not the end had the same appearance of being mutilated?

A. No, I don't believe it did, to my knowledge, although it may have been battered to some extent.

Q. Did it appear to be the same weight as this object? A. Approximately.

Q. Did you have any knowledge of what the object might be? Did you form any conclusion or anything of the object?

A. Well, as I recall, at the time we picked them up, we wondered what they were. Of course, it didn't take too long to determine they were lead and they were very [24] heavy, and I think I made a statement somethink like that "I wonder if that is a piece of lead conduit of some type that possibly the telephone company used?" and knowing some of their works, they do use a heavy type lead conduit. And otherwise from that, I don't believe there was much more of a statement made. We knew they were lead, Mr. Coffey used a lot of lead, so our first thought was taking them to him.

Q. Have you ever seen a bomb or an explosive of any kind remotely resembling that in any way?

A. I don't think so. I had occasion to see some, oh, something like bombs like that in displays after they were identified. In fact, in Seattle there at the time, why, I hadn't even remembered them being tapered; I thought, as I remembered them, they were more just like a cylinder, but after they were identified, then I could see a resemblance to possibly

(Testimony of Albert J. Osborne.)

something like that, but I am not familiar with them, no.

Q. Between the time you took them to Mr. Coffey's place—incidentally, that was on the same day you found them? A. Yes.

Q. You were staying at his place?

A. Yes, hunting there.

Q. During hunting season? A. Yes. [25]

Q. 1951? A. Approximately.

Q. After you took them to his place and up until the time the explosion occurred, did you have any knowledge or learn anything during that period of time that would lead you to form a conclusion as to whether or not that was an explosive in it?

A. No, sir.

Q. The terrain where you found this, can you describe that to the best of your ability?

A. Well, I would say it is more of a farming country. It is on a rolling hillside and in along the hillside there is these gulleys and draws. They don't try to farm the bottom of them, they form weed patches in them, and so during the hunting season, why, we would go to the different farmers and ask to come down through a draw.

Well, when we came, after we had proceeded down through the draw and came out, oh, I don't know, I don't even remember how far it was from the road, and started to turn back and get up on the road, why, we found these objects lying—

The Court: Approximately how far from the road?

(Testimony of Albert J. Osborne.)

A. Oh, 50 feet, possibly.

The Court: Oh. [26]

A. 50, 75 feet, something like that.

The Court: Is that a public road?

A. Yes, it is a county road.

The Court: County road?

A. Yes.

Q. (By Mr. Loney): I will ask you if you can see in this Identification 4 what appears to be the road?

A. I can't see it well enough to identify it. It looks like this terrain around there.

The Court: What were you hunting? Birds?

A. Pheasants. As we came up out of this draw, before we got to the road, there was kind of a bare place that I recall, kind of dry dirt more than anything else. I can't see the road. It isn't light enough for me.

Q. (By Mr. Loney): Can you see anything that looks familiar in any of these pictures?

A. Well, those are those typical draws that we hunted, yes, orchards on them.

The Court: You will have to keep your voice up.

A. I say, this is the typical draw.

The Court: Yes, all right.

A. And the orchards around where we were hunting.

The Court: I can hear you, but I didn't think Mr. Tugman could.

A. I'm sorry. And that is some more of the similar [27] terrain around there.

(Testimony of Albert J. Osborne.)

Mr. Loney: Thank you. I think I have no further questions.

Cross-Examination

By Mr. Tugman:

Q. Have you ever seen any bombs before, Mr. Osborne?

A. Well, when you say have I seen them, to handle them, you mean to be acquainted with them?

Q. Yes? A. No.

Q. Doesn't Mr. Coffey have one in his home?

A. He had a small type of a bomb that I had seen previously, but, to me, when you mean handling them or being familiar with them, I am not. I had seen it.

Q. What was the shape of that bomb that Mr. Coffey has?

A. With my hands I could show you. It is possibly that high and that large around (indicating). It does have—I think it has some fins on it.

Q. About how much does it weigh, do you know?

A. I don't recall handling it very often enough to be familiar with it.

Q. In shape, it tapers, does it not?

A. Yes, it does.

The Court: Mr. Osborne, you indicated how high. I [28] couldn't tell, I didn't see your lower hand there.

A. Probably 12, 14 inches.

The Court: About 12 or 14 inches?

A. Yes.

(Testimony of Albert J. Osborne.)

Mr. Loney: If your Honor please, we have the object, I think it is here, if you want me to get it. We have it in a trunk, because possibly, in talking to the Sergeant about it, it possibly has an active cap in it, so we didn't bring it in. It is a mortar shell.

Mr. Tugman: Mortar shell or a bomb?

Mr. Loney: No, mortar shell. I will have it at lunchtime, if you like.

Mr. Tugman: That is fine, thank you.

The Court: I think it would be a good idea to deactivate any bomb before you bring it in the courtroom here.

Mr. Tugman: I think so. We have two experts here.

Q. (By Mr. Tugman): Mr. Osborne, does this bomb look now the same as it did when you first saw it? A. No, it doesn't.

Q. In what respect is it different?

A. Well, it is much cleaner and, to my knowledge, there wasn't any hole in it of any kind, any more than it was partially covered with dirt and slightly corroded, oh, dull, anyway. [29]

Q. What were the ends like?

A. I don't recall that. I'm sorry, I don't. I didn't examine them very closely any more than to scratch them and see if they were lead.

Q. That is all you did, just scratch it?

A. Yes.

Q. And see if it was lead, is that correct?

A. Yes, I think I could truthfully say that they

(Testimony of Albert J. Osborne.)

would resemble a piece of conduit. If there was a hole, it would be full of dirt.

Q. What made you think it resembled a piece of conduit?

A. Well, I have had occasion to handle quite a bit of lead pipe. I have taken about 150 to 200 pounds of lead pipe out of my house that I bought and replumbed it. There is a lot of them that size, but they are not that heavy.

Q. Would you describe a piece of conduit? How big a hole does a piece of lead conduit have?

A. I would say there would be all sizes of them, although normally for plumbing they would be a lot of that big around, but they wouldn't have as thick a wall as that.

Q. They wouldn't? A. No.

Q. Would they have a much thinner wall? [30]

A. Yes, but they were full of dirt, I couldn't see you would identify them too much different than this, although I didn't notice that this was tapered.

Q. Well, now, do you remember a hole in that bomb or not? A. No, I don't.

Q. What made you think it was a piece of conduit? Don't conduits usually have holes in them?

A. Yes.

Q. You must have seen a hole, then, if you thought it was a piece of conduit, didn't you?

A. Well, do I understand you right, if I look through here and see a hole?

Q. Yes, at the end of the bomb?

(Testimony of Albert J. Osborne.)

A. Or you mean a round aperture on this end that would possibly be full of dirt? That wouldn't be a hole, would it?

The Court: Well, just so you will understand, I think what counsel means is whether there was any indentation in it?

A. Well, I think I could say that there was an indentation.

The Court: You are not referring that you could see clear through the thing?

Mr. Tugman: No, no.

Q. There was an opening there?

A. Yes, I would say—I don't recall it too much, I [31] didn't examine it too closely, but I think I can recall that there was an aperture there of some type.

Q. Well, do you remember telling me, and this is Page 8 of the deposition, that you remembered seeing something inside of the hole that wouldn't be natural to lead pipe unless it was pretty well corroded?

A. Oh, I may have said something about the lead pipe.

The Court: Let's see, I think you should lay the foundation by calling his attention specifically to the deposition, when and where it was taken, and perhaps he has that in mind. Do you remember when your deposition was taken?

A. Yes, I do.

The Court: Well, all right, go ahead.

(Testimony of Albert J. Osborne.)

Mr. Loney: Any objection, your Honor, I would like him to read the statement?

Mr. Tugman: I will read the statement, yes.

Q. You remember the deposition that was taken in Seattle on December 10, 1954. A. Yes.

Q. And at Page 8 of the deposition, do you remember being asked:

“Do you recall seeing what appeared to be a hole, maybe an inch and three-quarters, maybe an inch, in diameter?” [32]

And your answer to that question:

“I don’t exactly remember seeing a hole. I do remember seeing something inside of that that wouldn’t be natural to a lead pipe unless it was pretty well corroded. We didn’t attempt to dig the stuff out.”

The Court: What was the last?

Mr. Tugman: “We didn’t attempt to dig the stuff out.”

The Court: Oh.

Q. (By Mr. Tugman): Do you remember how deep that hole was, Mr. Osborne?

A. No, I don’t. Can I say there was an indentation. You pick up an object—perhaps to clarify myself and my statement—when you found this object, we took it up, turned it over, looked at it, decided it was lead. We were hunting, we wanted to go on, so I didn’t examine the object any more, to my knowledge, and from that date to now I

(Testimony of Albert J. Osborne.)

hadn't seen the object again except a picture view.

Q. Was there enough room in the hole at the end of the bomb to put your finger in?

A. I would doubt it very much.

Q. But there was definite evidence that there was a hole there? [33]

A. Yes.

Q. Of some depth?

A. Yes, I would say so. Yes, I would say yes.

Q. I see. Now, how long have you been coming over to the Pasco-Kennewick area to hunt?

A. Well, I worked here during the time in 1936, '37, '42, '43, and those were summer seasons.

Q. Did you have occasion to be in the Pasco-Kennewick-Yakima area during the period 1942 to 1947, '48?

A. Yes, two or three different summers I worked on construction work, road construction.

Q. Were you aware that there were any military bombing reservations in that area?

A. Not too much, any more than I was fairly well familiar with the Navy restrictions on their areas out of Pasco.

Q. What were these Naval restrictions?

A. They had signs up—they weren't fenced, they had signs up that it was a Navy reservation and "Keep Off," although we were limited to go to those during the working periods.

Q. I see. Why did they have signs there, do you know?

A. To keep the public off, I would say.

Q. Do you know what they used those areas for?

(Testimony of Albert J. Osborne.)

A. Most of them that I was around were landing areas, [34] airplane landing and take-off areas, small ports, airports.

Q. Do you know of the existence of any areas used for bombing, strafing?

A. Not personally, no, I didn't.

Q. Did you ever see any planes drop any bombs or hear any explosions after a plane dropped a bomb in any of these areas?

A. Not in this area around here. I did have an occasion to know of them dropping bombs up in around the Sprague Lake, Spokane, Cheney area.

Q. I see. So you did know that the Navy did use some of this area for bombing ranges, is that correct?

A. Yes, some of this area.

Q. When you lived in that area, did you subscribe to any papers in the Tri-City or the Yakima area?

A. No, I didn't, sir.

Q. Did you ever have any occasion to look at any of these newspapers?

A. I suppose.

Q. Do you ever recall seeing any warnings or stories published by the Navy in that respect?

A. No.

Q. Do you ever recall seeing any in 1950 or '51 or '52?

A. No, I didn't. [35]

Q. Would you say that this Exhibit 1 here, Plaintiff's Identification 1, was cylindrically egg shaped?

A. It is, I would say it is now, yes.

Q. You would say it is now?

A. Yes.

(Testimony of Albert J. Osborne.)

Q. Was it in the same shape when you picked it up?

A. I am going to only have to say I think so, because I don't recall too well the object in itself.

Q. In other words, it is about the same shape as Mr. Coffey's dud bomb that he has home?

A. This object is about the same as the dud that he has at home?

Q. Yes?

A. If you are going to get real technical, I am going to say no, because the other one was a more spherical shape and longer and larger, and I think the other one has a corrugation on it.

Q. I see. But they are very similar?

A. In a way, yes.

Q. In a way? A. Broad form, yes.

Q. Now, referring to the deposition again that was taken on December 10, 1954, in Seattle, and referring to Page 17, I will ask you if you recall making this statement in answer to a question asking if you recognized a [36] piece of a bomb that was shown you, which was marked as Defendant's Exhibit A at that time, and you stated:

“Well, I wouldn't recognize this as the piece I picked up any more than it looks like it. The lead we found was smooth on both ends and had not been torn and disturbed in any way.”

Your statement as to the bomb that you found was it was smooth on each end and had not been disturbed in any way?

(Testimony of Albert J. Osborne.)

A. That is my recollection, yes. I don't remember it being disturbed like this. As I recall, it was fairly smooth.

Q. Well, now, you said it was smooth on both ends and hadn't been disturbed in any way. Is this object here changed in that respect since you first saw it? A. I think so.

Q. In what respect is it changed?

A. Well, I don't remember any of this part being disturbed (indicating) or even on this end being actually battered or whatever you would call it, or blown off or something.

Q. Does it look like it has been blown off there?

A. It does slightly here some place. Of course, I happen to know that that would prejudice me to say that I [37] think it does look like it. If I hadn't never seen it before, I wouldn't know what had happened to it.

Q. Well, let me ask you, Mr. Osborne, have you seen this object at any time between the time that you picked it up and the time that you see it right now? A. No.

Q. Then, you haven't seen it in the interval at all?

A. Excuse me, possibly just outside the door here.

Q. Just outside the door here? A. Yes.

Q. So that the only recollection you would have of it would be the time that you first saw it?

A. That's right.

Q. Now, asking you again, have the ends of that

(Testimony of Albert J. Osborne.)

bomb been changed since the time that you first saw it?

The Court: Well, he wouldn't know that.

A. No.

The Court: He would only know whether it appears to be changed.

A. Just appears——

Q. (By Mr. Tugman): Appears to be changed?

A. I couldn't say whether it has or not.

Q. Does it appear to you now it is a little shorter now than it was? A. Very possibly. [38]

Q. Very possibly. At any rate, it wasn't as jagged at the time you first saw it?

A. That is my recollection, yes.

Q. I see.

Mr. Tugman: Thank you, I have no further questions.

Redirect Examination

By Mr. Loney:

Q. Mr. Osborne, Mr. Tugman has asked you about the bomb that Mr. Coffey has at home. Do you know whether or not that is a bomb or not?

A. No, I don't. From hearsay, I understand it is not a bomb. I understand it is a mortar shell. But when I made the statement in the deposition, he asked me if I had ever seen anything like that or a bomb before, I said, well, I had seen the one in—that Mr. Coffey had at his home, and at the time I thought it was a bomb.

Q. Did you know whether any bombs were being

(Testimony of Albert J. Osborne.)

dropped, whether there was a target range in this area, before Mr. Coffey's accident? I mean, to your knowledge at that time, did you know anything about any bombing ranges?

A. Do you mean of the specific—— [39]

The Court: Pardon me, I think you should define area a little more closely, because when he said he knew of a bombing range in the area, he was talking about Sprague Lake, which is a long way from this place. Area might mean all of Eastern Washington or Inland Empire.

A. That's right.

Q. (By Mr. Loney): Let me ask it this way: Did you know of a bombing range within, well, say, a radius of ten miles of Mr. Coffey's farm in Benton City, Washington?

A. I have heard there is a Zillah Bombing Range. I do not know the boundaries of it, I have never been on it, and that would possibly be in that distance, yes.

Q. Do you know where Zillah is?

A. I know where the town of Zillah is.

Q. Would Zillah, the town of Zillah, be within ten miles of Mr. Coffey's place?

A. Well, it would be close, but I doubt if it is ten miles. I think it is a little farther than that.

The Court: Where you found this object, I haven't got the place yet. It is near the Yakima River, but what town was it nearest?

A. Your Honor, there is a highway called the Inland Empire Highway that is on the north side

(Testimony of Albert J. Osborne.)

of the Yakima River that follows along the foot-hills. It was the old original Walla Walla-Yakima highway. And Mr. Coffey's place [40] is approximately a mile and a half or two miles north of that, although where we were hunting was between Mr. Coffey's place and this highway, and the highway parallels the river about a mile north of it. That is fairly close.

The Court: But where were you up and down the river?

A. We were about three and a half to four miles west of Benton City.

The Court: Oh, that is all right. I know where it is now.

Q. (By Mr. Loney): Were there any warning signs or any government signs at all in this area?

A. No, no, we were on private property. We had asked permission to hunt on this man's place and went through. When we came back, we were still on his property.

Mr. Loney: No further questions.

Mr. Tugman: I have no further questions.

The Court: That will be all, then, Mr. Osborne.

(Witness excused.) [41]

* * *

MRS. ELMER G. COFFEY

called and sworn as a witness on behalf of the plaintiffs, was examined and testified as follows:

Direct Examination

By Mr. Loney:

Q. Mrs. Coffey, you are one of the plaintiffs in this action? A. Yes.

Q. And your husband is Mr. Elmer Coffey?

A. Yes.

Q. How long have you been married? [65]

A. 30 years the 1st of April.

Q. And you reside on a farm near Benton City, Washington? A. Yes.

Q. Can you tell us the approximate location, the distance from Benton City and the direction?

A. It is about four and a half miles west of Benton City.

Q. And about how far is it from the Yakima River, do you know?

A. I imagine our ranch is about a mile and a half. I am just guessing, I am not very good judge of distances.

Q. You are right in the midst of a busy season there now, is that correct?

A. Yes, we are lambing.

Q. How many sheep do you have?

A. We are lambing 200 ewes, but we have 100 yearling lambs that we have held over. Of course, we can't tell how many of them will lamb. We have 300 ewes, you might say. [66]

(Testimony of Mrs. Elmer G. Coffey.)

Q. When did you move there, Mrs. Coffey?

A. 1950, about the 2nd of March.

Q. Where had you lived before moving to Benton City? A. Seattle. [68]

Q. Up until Mr. Coffey's accident, did you have, yourself, any knowledge of any bombing range within a radius of 10 miles?

A. We never even heard of a bomb before that.

Q. Had there been any articles or did you listen to any warnings of any kind or in the papers?

A. No.

Q. Did you see this object before the accident at any time?

A. I can't actually say that I seen it. I remember them saying, "Here is you some lead." I think they dropped it down in the yard or something. But I have never been very interested in his gun activities, and I know he took it and threw it in the basement and I don't know that I ever saw it to actually say that I could identify it. [69]

* * *

Mr. Tugman: I would like to move that any testimony she just gave as to where the bomb was found be stricken.

A. I don't know, yes.

The Court: That will be disregarded.

A. That is true.

The Court: I think I brought that on by asking the question. She doesn't know, I assume.

A. No.

(Testimony of Mrs. Elmer G. Coffey.)

The Court: Where it was. And the only thing she can testify to is as to how far she is from Benton City.

A. Yes. [71]

* * *

The Court: All right, proceed.

Mr. Loney: May this be marked as an exhibit?

The Court: Yes, all right.

The Clerk: Plaintiff's Exhibit 8 for identification.

Mr. Loney: Perhaps we might call Captain Smith, if your Honor please, just briefly for purposes of identifying some of these exhibits. [73]

E. B. SMITH

called and sworn as a witness on behalf of the plaintiffs, was examined and testified as follows:

The Court: Do you wish him to step down there?

Mr. Loney: Yes, if I may.

The Court: He may as well stay there, then.

Direct Examination

By Mr. Loney:

Q. Your full name, sir?

A. Captain E. B. Smith, U.S.N.R., retired.

Q. Captain Smith, you were formerly in charge of the Naval Air Station at Pasco, Washington?

A. I was.

Q. Can you give us the time?

A. From its inception until August the 23rd, 1944.

(Testimony of E. B. Smith.)

The Court: Did you see you were an Army Captain?
A. Navy.

The Court: I'm sorry, I will not apologize because I was in the Army, but I will correct my impression.

Q. (By Mr. Loney): Captain, were you familiar with the location of certain target areas in that general vicinity?

A. Yes, I laid them out originally as outlined fields, flying fields.

Q. Referring there to what has been marked as Exhibit 8, [74] do you suppose that you could by pen mark in the areas that were target areas in Benton County, to the best of your recollection and from your map?

A. My best recollection is that this one labeled here as Richland was the only one that was used. Now I will try and convert that to this map, if you wish, if I can here.

Q. Please.

A. If I can. That is Section 13. See if we can get this. Range 28 and in Township 13. It must be this one here (indicating). That is a state road. This one right here (marking on exhibit).

Q. Then to your best recollection, there were no other ranges in use?

A. To my best recollection, that was the only one that we used.

Q. Now, were there any Army ranges that you know about?

(Testimony of E. B. Smith.)

A. Yes, there was one just north of Saddle Mountain.

Q. Would that have been in Benton County?

A. I do not know, I can't answer that. I think not.

The Court: That would be in Grant County?

A. I think so.

Q. (By Mr. Loney): Then on Identification 8, you have marked two circles in pen, and that indicates, to your best knowledge, the location of that target area in [75] Benton County?

A. Yes, sir.

Q. Now, you have two circles there. Is there any significance to that?

A. None, just to make it conspicuous.

Q. I see, fine. And that range, you would say, took up about a quarter of a section, is that about right, size?

A. That is correct, it was a quarter of a section.

Mr. Loney: That is all the questions I have of this witness.

Cross-Examination

By Mr. Tugman:

Q. What was that range or that area that you identified on the map here? This area here which was identified right here (indicating), I wonder if you would initial that, please, so that we will know?

A. (Witness complies.)

Q. What was that range used for there? What type——

A. That was used for dive bombing.

(Testimony of E. B. Smith.)

Q. For dive bombing.

Mr. Tugman: I have no further questions.

Mr. Loney: No further questions. I presume Captain Smith will be recalled later? [76]

Mr. Tugman: Yes.

The Court: All right.

(Witness excused.)

Mr. Loney: I have the legal description of the farm land owned by Mr. Coffey, your Honor, and we can superimpose that on this tract, if you have no objection.

Mr. Tugman: I have no objection.

The Court: All right.

Mr. Loney: May I borrow that pen? Let the record show now that I am marking with a wavy line an area on the map in Section 3, Township 9 North, Range 26, to indicate the approximate location of the land owned by the plaintiff in this action and on which his home is situated.

With that explanation, your Honor, I offer this map as an exhibit.

The Court: Do you have any objection?

Mr. Tugman: I have no objection.

The Court: It will be admitted, then. That is No. 8?

Mr. Loney: Yes, your Honor.

The Clerk: No. 8.

The Court: Yes. [77]

(Whereupon, the said map was admitted in evidence as Plaintiff's Exhibit No. 8.)

Mr. Loney: I might recall Mr. Oliver Osborne for the purpose of marking the location where the bombs were found.

The Court: Here, I can look at it afterwards. He has been sworn already, Mr. Granger, he testified this morning. You can hand him that and mark on it, if you wish.

OLIVER OSBORNE

having previously been sworn, resumed the stand on behalf of the plaintiffs, and testified further as follows:

Direct Examination

By Mr. Loney:

Q. Referring to Exhibit 8, Mr. Osborne, and showing you the location as pointed out on the map of Mr. Coffey's property, I am wondering if you would by this red pencil indicate the approximate location of the draw in which you and Mr. Osborne found these objects?

A. This is the Coffeys' property' (indicating)?

Q. Yes.

A. And there is an orchard on this corner and the draw would be bordering the orchard (drawing). Something in that location, as near as I expect I can place it. [78]

Q. You have indicated the draw crossing a road on that map, is that correct?

A. Well, yes, it crosses the road.

Q. And does it go down into the Yakima River?

A. I believe it does.

(Testimony of Oliver Osborne.)

Q. That is the approximate area where you found these bombs? A. Yes.

Mr. Loney: We have no further questions.

Mr. Tugman: I wonder if you could have the witness initial that, please?

Mr. Loney: Oh, surely, excuse me.

Q. Would you just put "O. O." on there?

A. Any place?

Q. Yes, that will be fine.

A. (Witness complies.)

Mr. Loney: Thank you.

The Court: Do you have any questions?

Mr. Tugman: I have no questions. [79]

* * *

RUSSELL W. McCAMMON

called and sworn as a witness on behalf of the plaintiffs, was examined and testified as follows:

Direct Examination

By Mr. Loney:

Q. Sergeant, you are a Sergeant First Class?

A. I am just a Sergeant, sir.

Q. Just a Sergeant. In the United States Army, is that correct? A. Yes, sir.

Q. And what organization are you attached to?

A. 62nd Ordnance Detachment, E.O.D., Camp Hanford, Washington.

Q. And what is your particular function with that organization?

(Testimony of Russell W. McCammon.)

A. I am an explosive ordnance specialist.

Q. Explosive ordnance specialist?

A. Yes, sir.

Q. And how long have you been trained for that occupation? A. Since 1951, sir.

Q. Before 1951, were you in any kind of an ordnance unit?

A. No, sir, I was in an engineer battalion before then.

Q. Had you had experience prior to 1951 with explosives? [81]

A. With explosives, but not with explosive ordnance.

Q. Can you explain?

A. Well, there is lots of difference between explosive ordnance and explosives. In explosive ordnance, a piece of explosive ordnance such as you have there. A block of T.N.T. isn't explosive ordnance.

Q. That is just an explosive? A. Yes, sir.

Q. In other words, ordnance has some particular meaning regarding shells? A. Yes.

Q. And equipment of that nature. Are you familiar with the range that Captain Smith previously identified, target range in Benton County? I will show you Identification 8 and show you the markings made by the Captain. A. Yes, sir.

Q. Are you familiar with that particular location? A. Yes, sir, I am.

Q. Have you had occasion to see any objects that

(Testimony of Russell W. McCammon.)

resemble these three pieces that I am asking that the Clerk mark for me?

The Clerk: Plaintiff's Exhibit 9 for identification.

Q. (By Mr. Loney): While you are marking those, I will refer to Exhibit 1 and ask you if you have seen this type [82] of object before?

A. Yes, sir, I have.

Q. Do you know what that is?

A. Yes, sir, I do.

Q. Could you describe what it is, please?

A. It is a 13 pound practice bomb.

Q. Do you know that this is a 13 pound practice bomb? A. I know it is part of one.

Q. There are different weights of bombs?

A. Yes.

* * *

Q. (By Mr. Loney): Sergeant, could you describe the [83] different weights of practice bombs?

A. Well, there is 4, 6, 10, 13, 20, 100. I believe 100 is the highest, which is a water-filled one.

Q. Do you know what kind of materials the 4 pound bomb has?

A. Mostly cast iron, sir.

Q. And the 6 pound, do you know what they are made out of? A. Cast iron.

Q. What are the 13 pound bombs made out of?

A. Lead composition of some sort.

Q. Lead composition. Will you just tell the Court how you are able to say that this is a 13 pound

(Testimony of Russell W. McCammon.)

practice bomb? Can you explain to the Court how you know that?

A. Just familiar to me, that's all.

Q. Well, do you know whether this is lead or cast iron? A. I know it is lead composition.

Q. How do you know that?

A. Well, from my handling of them.

Q. From the training that you have had in the service? A. Yes.

Q. And, now, this doesn't appear to be intact to your knowledge, does it? A. No, sir.

Q. And it appears to be partly missing?

A. It is. [84]

Q. Have you any way, then, of telling this initially was a 13 pound bomb?

A. Yes, the size of the nose of it here.

Q. The size of this nose? A. Yes.

Q. Would you state, Sergeant, whether or not in your opinion this bomb has been dropped from a considerable height, and I speak in terms of 1,000 or 2,000 feet. A. I couldn't say that.

Q. Can you tell by examining it what might have happened to that, or are you able to?

A. Well, those can be dropped from very low altitude and disintegrate, that is, break in pieces.

Q. Does the speed with which they are dropped have any significance?

A. Yes, sir, I would say the speed of the bomb, the speed of the plane, yes, sir.

Q. Well, could you state in your opinion whether or not this had been dropped from an airplane?

(Testimony of Russell W. McCammon.)

A. No, I couldn't.

Q. Do you know any reason why these marks would appear on it that do appear on it?

A. Well, from being dropped, I imagine, is the reason they appear on there, but I couldn't say what it was dropped from. It could have been drug across the ground and [85] done that.

The Court: I didn't hear that last statement?

A. It could have been drug over rough terrain.

The Court: Oh, I see, yes.

Q. (By Mr. Loney): Could you tell the Court how anyone could drag this across rough terrain and do this?

A. I don't know, they do some funny things.

Q. Well, would it seem probable?

A. No, it wouldn't seem probable.

Mr. Tugman: I am going to object to that. I think he answered the question before and I ask the last remark——

The Court: I will let it stand. You may go ahead.

Q. (By Mr. Loney): Well, Sergeant, in your experience with this type of ordnance, can you state whether or not from your examination of that object—you may examine it, if you would like, look at it—can you state whether or not anything on that object has any significance to you as an ordnance expert?

A. I can see it has been detonated.

Q. It has been, the explosive charge in there has been fired?

(Testimony of Russell W. McCammon.)

A. That's right, it has been rendered inert and the pin is gone. The tail fins are gone. Could have laid out in the area for sometime and erosion, the sand erosion, could have caused this smoothness on the end here. I [86] can see that it has been hammered.

Q. You have seen such ordnance that has been dropped from airplanes? A. Yes, sir.

Q. Is there anything about the nose, the large part of that object, that would look different than an object that had been dropped from an airplane?

A. No, sir, except that this is cleaned up.

The Court: This is what?

A. That this is cleaned up, cleaned out. When it is dropped, they are generally filled.

The Court: I see, yes.

The Clerk: Your Honor, I have marked Plaintiff's Exhibits 9, 10 and 11 for identification.

The Court: Oh, all right.

Q. (By Mr. Loney): Referring now to Exhibit No. 2, is there any difference between this object and the object that is marked 1 in so far as what it started out as?

Mr. Tugman: Your Honor, at this point I will object to any question until the objects have been identified as to what they are and where they come from and some identification made of them, some foundation laid.

The Court: Well, I think counsel can proceed this way if he wishes. Then, of course, if he doesn't connect it up, they won't get into evidence. The

(Testimony of Russell W. McCammon.)

Court will disregard [87] the testimony concerning them.

Mr. Loney: I will try and tie them in, your Honor.

The Court: Yes. What number is this?

Mr. Loney: This is No. 2, your Honor.

The Court: Oh, 2. Well, isn't that the one that the Osbornes identified as the one they picked up, or——

Mr. Loney: I don't believe they did, as I remember, no. I think these all came——

The Court: Oliver Osborne testified that Exhibit No. 2 looked like the one he picked up.

Mr. Loney: Yes, sir.

The Court: Didn't say it was the one. All right.

A. May I go ahead?

Q. (By Mr. Loney): Yes, Sergeant.

A. The retaining pin is still in this. It has a rock jammed in there. This is the retaining pin (indicating).

The Court: Oh.

A. There is a rock jammed there.

The Court: Is that the retaining pin?

A. Yes, sir.

The Court: Holds the charge in place?

A. Yes. It also has your primer casing here in it yet.

Mr. Loney: May I have that shotgun shell that you have just to illustrate to the Court?

(Mr. Loney goes to back of courtroom.) [88]

(Testimony of Russell W. McCammon.)

The Court: That is just a rock jammed in there?

A. Yes.

Mr. Loney: Your Honor, for illustration purposes, that is the charge they are loaded with, and it is an over-long shotgun shell, and I think, Sergeant am I correct, that this shotgun shell fits in here (indicating)?

A. That's right.

Q. And that there is a cap sits on top of it?

A. Yes, sir.

Q. And the force of striking the ground is supposed to strike the shotgun shell and explode it?

A. Detonate it, yes, sir.

Q. You will notice the object in the end of that, a rock and sand? A. Yes, sir.

Q. Does that appear to have been dropped?

A. Yes, sir, it does.

Q. Either a considerable height or with considerable speed? A. I would say so.

Q. Showing you Exhibits 10, 11 and 9, marked for identification, I will ask you if you know what these objects are?

A. That is the parts of the same bomb we had.

Q. Can you tell what has happened to that?

A. What has happened? [89]

Q. Yes.

A. I would say—well, how do you mean that?

Q. Well, if you picked that up and looked at it as an ordnance man, what would be your opinion as to the prior history of that object?

(Testimony of Russell W. McCammon.)

A. Just a piece of fragment from a 13 pound practice bomb.

Q. Well, does it appear to have been blown apart by an explosion or hammered apart or can you tell?

A. I can't tell. I would say from an explosion, though.

Q. That was Exhibit 9. Now, referring to Exhibits 10 and 11, I want to call your attention to the fact that these two exhibits fit together. Would you say that those were once a part of the same bomb?

A. I would.

The Court: That is 10 and 11?

Mr. Loney: Yes, sir.

A. I would.

Mr. Loney: Now I am going to have to ask a hypothetical question, Mr. Tugman, and I will have to bring in the other evidence later to tie it in. I will tell you that for your information.

Q. Assuming, Sergeant, that those fragments were found close together—when I say close, I mean within a radius of maybe 9, 10 or 20 feet—would you have an opinion as to how they might have been placed there? [90]

A. You mean from an explosion or from just being dropped?

Q. Yes, would you have an opinion on that?

A. Either could happen in this particular instance. You could drop that from a certain height and if it hit a hard object, it would. I have seen

(Testimony of Russell W. McCammon.)

them break in that many pieces and more without an explosion having occurred.

Q. But it would either have to have been dropped from a considerable height or have an explosion, is that correct? A. Yes.

Q. As an ordnance man, if you were to come across those objects lying in an area, we'll say, in a circular area of about a 25 foot radius and they were lying apart, would you have any opinion as to whether or not they had been dropped there from a height or whether someone had packed them there and tossed them?

Mr. Tugman: I am going to object to this line of questioning. I realize that counsel says that he is going to connect this up, but I would like to state my objection at this time.

The Court: Well, the record will show your objection, and I will permit the evidence, subject to motion to strike later.

Mr. Tugman: Yes, your Honor.

A. Well, from my standpoint, as far as my job is [91] concerned, I wouldn't consider these because there is nothing there that I have to consider. There is no explosive, it is just fragments.

Q. (By Mr. Loney): Well, I am speaking about how they might have gotten there, is all?

A. Well, I couldn't say that. It could happen either from being dropped or from an explosion.

Q. But you would think it would happen from one or the other, is that correct?

A. Until I found the nose of this, I would con-

(Testimony of Russell W. McCammon.)

sider that it happened from an explosion. If I found the nose to be intact, why, then I would think it would happen from being dropped from an altitude.

Q. In other words, you wouldn't know whether it exploded or was dropped, but you would think one or the other happened? A. Yes.

Q. And these, I believe you stated, are definitely in your opinion parts of a 13 pound practice lead bomb? A. Yes.

Q. To your knowledge, did the Army use this type of practice bomb?

A. Yes, I know they did. It is an A-N, that is, Army and Navy.

Q. Ordnance? [92]

A. I don't know whether they used them in the areas in question.

Q. Have you had occasion to run across these same type of practice bombs in Benton County?

A. Yes, I have.

The Court: Did I understand you to say, Sergeant, that this is the type used by the Army and Navy?

A. Yes, sir.

The Court: But you don't know whether it is used by the Air Corps, is that correct, is that what you say?

A. That's right, sir.

Q. (By Mr. Loney): At the particular time, 1943 to 1945, it would have been used by either the Army or the Navy, because there was no Air Force at that time? A. Yes, sir.

(Testimony of Russell W. McCammon.)

Q. Do you know whether these are in use at the present time? A. No, sir, I don't.

Q. Sergeant, would you mind stepping down to this map of Benton County? Are you able by looking at that map to orient your surroundings?

A. Yes, sir.

Q. Now, I believe you stated that you have found similar objects in Benton County?

A. Yes, sir. [93]

Q. Could you describe to the Court in what area you found them?

Mr. Tugman: I am going to object again here, your Honor. I don't know whether counsel is trying to introduce these objects that he has here or qualify them, but until we have the objects or some description of what the objects are, I think this testimony is incompetent and not relevant at all.

The Court: Well, are you asking him if he found objects similar to 1 and 2, Exhibits 1 and 2?

Mr. Loney: Yes, your Honor.

The Court: If you limit it to that. I don't think there is any question about the identify of those, is there?

Mr. Loney: The Sergeant has testified that they are all parts of a 13 pound practice bomb, and I am asking about the 13 pound practice bomb, if he has located any more of them.

The Court: What you are really asking is if he found any of this type of 13 pound practice bomb in that area?

Mr. Loney: Yes, your Honor.

(Testimony of Russell W. McCammon.)

The Court: Without reference to what is or is not in evidence or established here?

Mr. Loney: That is correct.

Q. Did you find any?

A. Yes, right in here between Route 410 and the railroad [94] spur right here (indicating), right along in this area here.

The Court: Better have him mark that and initial it so we can tell where it is.

Q. (By Mr. Loney): Sergeant, I think I should call your attention to something. I believe—my mistake.

Would you mind, with this red pencil, just drawing a broken line, a dotted, broken line, around the area in which you have found these objects?

A. (Witness complies.)

Mr. Tugman: Your Honor, I am going to object again. There is no proof here or no showing at all what type of objects these were. He says they were fragments of 13 pound practice bombs, but we have no description of the objects, no definite identify as to the place they were pinned down, nothing beyond the fact that they were objects and he thinks they were 13 pound practice bombs. I think there should be a further showing than that.

The Court: Well, he has testified here that what he calls 13 pound practice bombs are similar to 1 and 2, which are marked for identification and I assume will be in evidence when the plaintiff testified that that is the one that blew up and injured him. Isn't that what is going to happen here?

(Testimony of Russell W. McCammon.)

Mr. Loney: Yes, your Honor. [95]

The Court: So you may let the record show your objection, but I assume it is going to be connected up at this time. If it isn't, it will be stricken later on.

Mr. Loney: I can move, perhaps, that Identifications 1 and 2 be admitted in evidence, if you haven't any objection to their being admitted.

The Court: Well, the trouble is at this stage it has been shown that this plaintiff's brothers-in-law found those two objects, but it isn't shown that they had any connection with his injury or with this claim you have here, so unless counsel wishes to waive objection, I think you haven't properly identified them.

Mr. Tugman: I would probably waive to Identification 1, I have no objection to.

Mr. Loney: Well, we could offer that because they did have that in their possession.

The Court: Yes, No. 1 will be admitted, Plaintiff's Exhibit No. 1.

(Whereupon, the said object was admitted in evidence as Plaintiff's Exhibit No. 1.)

Q. (By Mr. Loney): Now, you have marked an area with a red broken line and you have initialed that, Sergeant McCammon, and that area is where you have found other [96] 13 pound practice bombs, am I correct? A. Yes, sir.

Q. Have you found them in an area outside of that location, do you know?

(Testimony of Russell W. McCammon.)

A. Yes, sir.

Q. Can you indicate any other parts of Benton County?

A. No, not in Benton County.

Q. Have you found any such type bomb any closed to Kiona, for example, than you have shown on the map?

A. No, sir, just that one area.

Q. Have you known of any being found out in this area where Mr. Coffey lives that is marked?

A. The only ones that were brought to our attention are the ones——

Q. In this case? A. ——in this case.

The Court: Only the ones in this case, did he say?

Mr. Loney: Yes, sir.

A. Yes, sir.

The Court: All right.

Q. (By Mr. Loney): You may resume the stand, sir.

Sometime in the first part of 1953, Sergeant, were you called to Mr. Coffey's property or some property near his?

A. The squad was, sir, I didn't go with [97] them.

Q. Oh, you didn't go with Captain Jackson?

A. No, I didn't go with him, I stayed in the office.

Q. I thought you had. Well, Captain Jackson is now over in Korea, isn't that correct?

A. Okinawa.

(Testimony of Russell W. McCammon.)

Q. Well, then, you have no personal knowledge where Captain Jackson got those?

A. Only what he told me from mouth.

Q. Well, don't answer this question right away because I presume counsel would like to object to it: I would like to ask you what Captain Jackson told you when he returned with some 13 pound bombs?

Mr. Tugman: I will object to that, your Honor.

The Court: Yes, I think that is hearsay. Sustain the objection.

Mr. Loney: May I say a word on that, your Honor?

The Court: Yes.

Mr. Loney: I had this feeling, that these gentlemen are ordnance experts for the United States Army and, as such, would seem to me to be speaking agents as to this type of ordnance and their statements would be admissions against the United States Government.

Mr. Tugman: Well, I would take exception to that. I think under this Tort Claims Act, the Government, if it is to be found liable at all, must be found liable under the [98] same circumstances that an individual would be found liable, and I don't think that the Tort Claims Act creates any and all Government employees agents of the Government.

The Court: Not for the purpose of admitting liability, I am afraid not.

Mr. Loney: There would be no admission of liability, just a statement of what happened, that he was given those bombs, and——

(Testimony of Russell W. McCammon.)

The Court: I think that would be hearsay as to what Captain Jackson told this witness.

Mr. Loney: Very well, your Honor. I understand the rule in Federal Court to be that it is not necessary to make an offer of proof, as long as the witness is here and we have discussed it with your Honor and advised your Honor what he would testify to, and, therefore, I won't make that offer of proof.

The Court: Yes, all right.

Mr. Loney: Unless your Honor wishes it.

The Court: No, I don't think it is necessary.

Q. How do you deactivate that type of ordnance, Sergeant? A. T.N.T.

Q. T.N.T.? A. Yes, sir.

Q. What does that mean? [99]

A. Just pile them up in a pile and we get so many and blow them up.

Q. Put a charge underneath them and blow them up? A. Yes, sir.

The Court: You don't have to take that core out of there?

A. We are not allowed to.

The Court: Oh.

Q. (By Mr. Loney): Sergeant, referring to Exhibit 1, do you discern any writing on that, printing? A. Right there, sir (indicating).

Q. You do, your answer is yes?

A. Yes, it is.

Q. You are indicating a spot on the bomb. Is that clearly visible, what you call clearly visible?

(Testimony of Russell W. McCammon.)

A. Well, for extended ordnance, it is, yes.

Q. And for an ordnance man to read it, perhaps? A. Right.

Q. Very well.

The Court: Where is it?

A. Right there, sir (indicating).

The Court: Oh, yes.

Q. (By Mr. Loney): Sergeant, if that bomb had been dropped and lay in one position for sometime, would that be visible to the naked eye, that type of writing, [100] or would it? A. To me, yes.

Q. It might not, might it not, also?

A. Yes.

The Court: What does that say? Can you read it now? I can see some letters, but I couldn't make out what it spelled.

A. Make out part of it, but that's all.

The Court: That is something that is stamped on when the bomb is made?

A. Yes, it could be a lot number, various things.

The Court: Oh, all right.

Mr. Loney: You may examine, Mr. Tugman.

Cross-Examination

By Mr. Tugman:

Q. Where were you stationed, Sergeant, during the period 1943 to 1946 or '7? Were you stationed in this area? A. Sir?

Q. Where were you stationed in 1943?

A. New Guiana, sir.

(Testimony of Russell W. McCammon.)

Q. And I presume you were overseas all during that period? A. Yes, I was.

Q. Have you ever had any actual experience with this type of bomb, in loading those bombs or arming them or [101] anything of that nature?

A. No, sir, not in loading or arming them. No, I wouldn't arm them.

Q. To your knowledge, this type of bomb is used for high altitude bombing, is it not, practice bombing?

A. No, sir, it isn't, to my knowledge, used for high altitude; I understood it was low altitude.

Q. Beg pardon?

A. I understood it was low altitude bombing.

Q. You mean 6,000 feet or something like that?

A. Well, yes.

Q. But it is used for straight, level bombing, is that right? A. Well, I couldn't say, sir.

Q. You don't know? A. I don't know.

Q. I see. Have you ever seen any of these things used? A. No, sir, I haven't.

Q. Are you called out in the course of your occupation to detonate bombs that people find?

A. We are called out to take care of them, yes, sir.

Q. Have you ever been called out in the Richland area to detonate bombs? A. Yes, sir.

Q. What kind of bombs have you [102] detonated? A. 100 pounders.

Q. Have you detonated any other kind of bombs?

(Testimony of Russell W. McCammon.)

A. Yes, we detonated some of those.

Q. And you are called out at people's request to detonate this type of bomb? A. Yes.

Q. Then, as I understand it, you get calls from private citizens who have found this type of bomb and they call you out to set the thing off, is that correct?

A. Well, they call us out to take care of it.

Q. By taking care of it, you mean de-arming it?

A. We take it away from their property, from the locale. Maybe we blow it in place if it is that dangerous.

Q. Now, you speak, Sergeant, of a pin that is in the firing part of the bomb here in the head of it. Is this the head of the bomb here (indicating).

A. Yes, sir.

Q. The big part. Do you see any place in Exhibit 1 here where a pin should go?

A. Yes, sir.

Q. Would you please show us where that is?

A. Right through here, sir (indicating).

Q. I see. And how does that firing mechanism work there? What sets the bomb off?

A. This point, it is just on impact, its inertia, fire, [103] point of detonating.

Q. What is the nature of that pin? Is it imbedded in there, is it solid? A. This pin?

Q. Yes. A. No, it isn't solid.

Q. Well, I mean can it be taken out?

A. Yes.

Q. In other words, it is not locked in there, is

(Testimony of Russell W. McCammon.)

that correct? A. No.

Q. I see. Is there anything else in there which sets the bomb off?

A. Yes, there is a retaining cap here (indicating).

Q. Retaining cap. And in the inside of the bomb, there is a shell? A. Yes, sir.

Q. Is this a shell inside of here?

A. That is part of one, sir.

Q. Is that the type of shell that was used in this type of bomb? A. Yes, sir.

Q. Now, I notice a metal object in here. What is that?

A. That is where your primer—this is your primer cap. However, your primer is gone from this one. [104]

Q. I see. What would have happened to the primer? Would it distintegrate upon the explosion?

A. Sometimes they do and sometimes they don't.

Q. I see. Now, how far is the pin from the end of the bomb, would you say?

A. Well, I would say a half inch, three-quarters of an inch.

Q. I see. How much metal is in the cap underneath the pin? A. How much metal?

Q. Yes? You said that there was a cap there next to the primer. A. Very little.

Q. Very little. And what kind of material is that made out of?

A. Well, some of it, I believe it is cast, I don't know just what material it is made out of.

(Testimony of Russell W. McCammon.)

Q. Is it the same material as the bomb?

A. No, sir.

Q. I see.

The Court: It isn't like the end of an ordinary shotgun shell?

A. Well, this is the end of the shell.

The Court: Brass?

A. No, sir, I have never seen any brass. Looks more like [105] a white metal or a hot metal affair.

The Court: Does this thing have an end on it here with a cap in the middle?

A. Yes, just like a shotgun shell.

The Court: Yes, that is what I mean.

Q. (By Mr. Tugman): Have you ever seen one of these 13 pound practice bombs that had not been exploded? A. Yes, sir.

Q. You are familiar with that type of ordnance?

A. Yes, sir.

The Clerk: Is it loaded?

Mr. Tugman: No, it is not loaded. Here is the load (indicating).

The Clerk: That will be Plaintiff's 12 for identification—or Defendant's 12 for identification.

The Court: Yes, that is Defendant's 12,

The Clerk: Defendant's 12.

The Court: I wonder if we shouldn't mark those others 12-A and B? They are all part of the same one?

Mr. Tugman: That would be a good suggestion, Yes, they are, your Honor.

(Testimony of Russell W. McCammon.)

Q. Showing you Defendant's Identification 12, have you seen any object of this nature before?

A. Yes, sir.

Q. Would you describe what it is? [106]

A. 13 pound practice bomb.

Q. This is the same thing as Plaintiff's Exhibit 1 which I just took from you? A. Yes, sir.

Q. I see. Now, what is the material that these things are made out of, do you know?

A. It is a lead composition, is all I know.

Q. A lead composition? A. Yes.

The Clerk: This is 12-A.

Q. (By Mr. Tugman): Showing you Identification 12-A, what is this item?

A. That is a retaining pin.

Q. Where does the retaining pin fit in relation to this bomb?

A. Right in this hole (indicating).

Q. I see. It just goes through this little hole here? A. Yes, sir.

Q. Now, would that retaining pin, Sergeant, fit Plaintiff's Identification No. 1?

A. If it is a different lot number, it wouldn't.

Q. I wonder if you would try it and see if you could say that the pin on that—

A. Yes, sir, I would.

Q. So these bombs would have been [107] identical? A. You mean—

Q. The same lot number? A. Yes.

The Clerk: Defendant's Exhibit 12-C.

(Testimony of Russell W. McCammon.)

The Court: What was B?

Mr. Tugman: B is the pin, your Honor.

The Court: The pin was A.

Mr. Tugman: The shell, I believe, must be B.

The Clerk: The shell is B.

The Court: Oh, all right, that is all right. I want to keep them straight.

Q. (By Mr. Tugman): Showing you Defendant's Exhibit 12-C, what is that?

A. That is your retainer for your round.

Q. Where would that fit in?

A. Right in here (indicating).

Q. It fits right in the nose? A. Yes, sir.

Q. Would the retainer fit into this Defendant's Exhibit 1-A?

A. It would if it hadn't been damaged.

Q. It has been damaged now so it will not, is that correct? A. Yes, sir.

Q. Will you please demonstrate how those fit into Defendant's 12? [108]

A. Your round goes in, see that little buffer there?

The Court: Yes.

A. See the little buffer in there?

Mr. Tugman: Yes.

A. Your round goes up against that. This goes in, this is grooved, your pin goes in there (indicating).

Q. I see.

A. This is grooved in line with your pin and your pin goes in there.

(Testimony of Russell W. McCammon.)

Q. I see. Now, before this Plaintiff's Identification 1 was exploded, the first mechanism in this Plaintiff's Exhibit 1 would have been intact, would it not?

A. The primer? I would say yes. Otherwise, it wouldn't have exploded.

Q. I see.

Mr. Tugman: I have no further questions.

Mr. Loney: I will stipulate with counsel that we can take that shotgun shell out of the record, if your Honor would like. Perhaps that is not a good thing to have.

The Court: What has that got in it, just ordinary smokeless powder?

A. Yes, it has. Black.

The Court: Black powder?

A. What we call a spotting charge. It has various colors. I believe there is yellow and purple and even red. [109]

Mr. Tugman: Perhaps I could ask the Sergeant if this could be disarmed now without danger to the Court?

A. No.

Chief Gunner J. B. Dickey, (From back of Courtroom): I will have to object to that.

The Court: Well, all right. I think the objection would be sustained. I think unless you have an empty shell, you better take that one out.

Does this type of power explode, does it detonate from a jar on——

A. Well, sir, that primer in that round detonates that charge of powder in there.

(Testimony of Russell W. McCammon.)

The Court: If you dropped that just right, it would go off?

A. Yes, sir.

The Court: Hit the cap.

Mr. Tugman: We can take this out, if you wish.

The Court: Yes, all right, I think that should be withdrawn.

The Clerk: Show it withdrawn. That is 12-B.

Mr. Tugman: I have no further questions.

The Court: Any redirect examination?

Mr. Loney: No, your Honor, that is all.

(Witness Excused.)

Mr. Dixon, will you take the stand, please? [110]

JAMES D. DIXON

called and sworn as a witness on behalf of the plaintiffs, was examined and testified as follows:

Direct Examination

By Mr. Loney:

Q. Your residence is Richland, Washington, Mr. Dixon? A. Yes, sir.

Q. And how long have you lived in the Tri-City area? A. 1946, sir.

Q. You are employed now by General Electric?

A. Yes, sir.

Q. You have noticed the objects that we have identified here today, particularly the one that is marked as Exhibit 1? A. Yes, sir.

Q. Would you mind looking at that object and

(Testimony of James D. Dixon.)

scratching it with your finger nail and feeling its weight and observing its shape?

A. It is a lead composition.

Q. Have you seen objects similar to this?

A. Yes, sir.

Q. Are you acquainted with Mr. Coffey, the plaintiff in this action? A. Yes, sir. [111]

Q. Did you know him prior to his accident?

A. Yes, sir.

Q. Did you or Mr. Coffey, before his accident, have occasion to discuss such an object or discuss bombs?

A. I never even knew he had one, sir.

Q. You have heard the Sergeant testify here today that those are 13 pound practice bombs. Have you had occasion to locate or find any of those similar type bombs? A. Yes, sir.

Q. Can you come down to this map of Benton County and indicate just generally? Can you find the places?

A. Not very good on maps, but I will give you a rough idea.

Mr. Tugman: Again, your Honor, I make the same objection to this testimony unless it is connected up.

The Court: Well, the record may show the objection. I will overrule it.

Q. (By Mr. Loney): You may show the area.

A. Well, I have found—let's see—the old road that cut off. Not familiar very much with this map. But I have found them at the side of the old con-

(Testimony of James D. Dixon.)

crete abutment on the range and I have also found them on the Benton City-Kiona cutoff over here on the side of the mountain. [112]

The Court: Do you have difficulty orienting yourself on the map?

A. Yes, never was very good on a map.

Q. (By Mr. Loney): Well, now, can you locate on this map, can you locate the Benton City cutoff road?

A. This, I take it, is the Benton City cutoff road (indicating).

Q. Going past the area marked Gross Cup?

A. Yes, I guess that is the road. I am not too familiar with it, I think it is.

Q. Can you locate what appears to be a mountain with an elevation of 1,405 feet?

A. This seems to be the mountain here which we——

The Court: Is this the cutoff road, is this the one you mean (indicating)?

A. That goes from Richland to Kiona.

The Court: From Kiona and comes in the back-door of Richland?

A. Yes.

The Court: Down the river?

A. It is in the area after you pass under the railroad underpass, the mountain is off on the right there. I have found them there.

The Court: I know where that is, if you can show it on the map. [113]

A. I have found some in this area and some in

(Testimony of James D. Dixon.)

this area (indicating). Just exactly which spot on this area, I couldn't pin point, but they are there along that plains area at the foot of that hill.

Q. (By Mr. Loney): Would you by a pen just show a circular area to indicate——

A. All the cases?

Q. Yes, sir.

A. Other than the bombing range?

Q. Yes, other than the bombing range.

A. Well, now, right here is a little gravel dump and this circle here might mean 300 yards, right or left, on the bottom of that grade there, that flat place (drawing).

Q. You have drawn now two areas?

A. I have found them in both places.

Q. For the record, you have drawn two areas with an ink line, and I wonder if you would put your initials on the map opposite each one of those areas?

A. This is not right the precise footage. (Initials drawing.)

Q. Now, as I understand your testimony, the two circles that you have drawn indicate approximately where you believe you found such an object as this 13 pound——

A. I have found them there, yes, sir. [114]

Q. At what point in time did you first become aware that these were bombs?

A. Well, the first, when I first came to Richland, I came to open a boat shop and was interested in any place that I could get hold of lead, and some-

(Testimony of James D. Dixon.)

body said you could find lead out on the old bombing range. So I went, I found out they were bombs, I didn't want any more to do with them.

Q. When you run across these objects, were you doing something else when you run across them?

A. Yes, sir, I go out in that general area quite often, go jackrabbit hunting, varmint hunting.

Q. Can you describe how you would find them, how they were on the ground?

A. Well, some of them would be just the tail fins and sometimes would be a fragment of a body, and that is the way you would find them. I have seen some that was almost as wholly intact as the one you have there on the table. Most of those were over near the bombing range, though.

Q. Did you ever discuss those with Mr. Coffey before his accident?

A. No, sir, I didn't, no, not until after he had his hand hurt, did I ever find out he even had one of them.

Mr. Loney: No further questions. [115]

Cross-Examination

By Mr. Tugman:

Q. How long did you say that you had been in the Richland area, Mr. Dixon? A. 1946.

Q. 1946. And you say that you have been out on the bombing range around Richland?

A. Yes, sir.

Q. You observed some signs out there, didn't you? A. No, sir.

(Testimony of James D. Dixon.)

Q. Quite a few people go out there?

A. Yes, sir.

Q. Have you ever heard or seen advertisements or anything in the newspapers regarding bombs?

A. No, sir.

Q. Or on the radio? A. No, sir.

Q. Or on the public schools, have you ever heard of anything like that?

A. No, sir, other than hearsay.

Q. Do you know of your own knowledge that there have been publications and campaigns relating to these low bombing ranges?

A. No, sir.

Q. You don't know that. You have been out to this range [116] yourself quite a few times?

A. Yes, sir, I go out to target my rifles in there, sir.

Q. Do quite a few people go out to that range?

A. Yes, sir.

Q. Do quite a few people take lead, and so on, from that range?

A. Just how many, I don't know, sir. Some do.

Q. Do you know of your own knowledge that some people take off pieces of bombs and that type of thing, take them home?

A. I have seen them in their homes.

Q. Did you say that you had one of them yourself? A. No, sir, I got rid of one I had.

Q. You did have one? A. Yes, sir.

Q. What was its nature?

A. About the same one as Mr. Coffey had there.

(Testimony of James D. Dixon.)

Q. I see. Quite a few people do go out and take those things off, is that correct?

A. I suppose they do, sir. I don't know just how many do. They make sinkers out of them.

Q. Is it general knowledge that there is a bombing range near Richland?

A. Well, a few of the men might know, but I don't think the majority of the people realize that there is an old [117] bombing range out there.

Q. Do you know? A. I do now.

Q. Have you known when you have gone out there?

A. I did when I was told that there was an old bombing range out there. I didn't know it until then.

Q. When were you told?

A. When I first came to Richland.

Q. How were you told?

A. Fellows in the area said that there is lead out there, some fellows making sinkers for the fishing kits.

Q. Who told you it was a bombing range? How did you find out it was a bombing range?

A. They just said it was an old bombing range.

Q. Who said——

Mr. Loney: I think this might be a little bit objectionable.

A. I don't know the man's name.

The Court: He has answered now.

Mr. Tugman: What I was getting at, your Honor, is that I was trying to show knowledge of

(Testimony of James D. Dixon.)

campaigns that the Armed Forces have had from time to time, publicizing the fact of these bombing ranges and of this danger to the public. That is what I am trying to get at.

The Court: He has testified to that, that he didn't [118] know anything about the campaigns, I understood your testimony to be.

A. Just the ones that I have learned from were old members that have been here in the Hanford construction days, hear them say on the buses that there is an old bombing range out there, and that's all.

The Court: All right, go ahead.

Mr. Tugman: No further questions.

The Court: Any questions, Mr. Loney?

Mr. Loney: No, your Honor.

The Court: That is all.

(Witness Excused.)

Mr. Loney: Mr. Frederick.

EMMETT N. FREDERICK

called and sworn as a witness on behalf of the plaintiffs, was examined and testified as follows:

Direct Examination

By Mr. Loney:

Q. Mr. Frederick, you are a mechanical inspector for the Army Engineers and you are now located in Mountain Home, Idaho? A. That is correct.

(Testimony of Emmett N. Frederick.)

Q. At the air base there. Did you know Mr. Elmer Coffey in 1952 and 1953? [119]

A. I did, yes.

Q. Were you at his home when he suffered the accident?

A. I was with him at the time, yes.

Q. Can you tell the Court what you were doing that day?

A. Yes, I went out there to cast .38 special and 30-06 bullets, the lead.

Q. Did Mr. Coffey have a hobby?

A. That's right, he did.

Q. What was that hobby? A. Reloading.

Q. All right, excuse me for interrupting. What did you do after you got out there? What, generally did you do?

A. Well, we were casting both 30-06 and .38 specials at the same time. He was throwing them with one mold and I was with the other. And he mentioned that he would like to increase the muzzle velocity of some up to approximately 3,000, and I said, "Well, the lead that we have here is too soft for that." And he said, "I think I have some hard lead in the basement." And he went in and brought out this dark looking object, it was dirty, and I asked him what it was and he said he didn't know. And it was dirty, we both agreed that we should clean it before we put it in the lead pot.

So he proceeded to clean it, I think he beat it with a hammer for awhile, to get the stuff off that was [120] on the outside of it, and then he had a pin,

(Testimony of Emmett N. Frederick.)

or I think it was a quarter-inch bolt, that he was scraping some stuff off the end, and then he started to drive it, and the next thing I knew the thing blew up.

Q. How close were you to him?

A. Well, just at the time it exploded, I stepped over to turn the lead pot down, and I don't know what would have happened if I didn't, but I had been looking right down at him prior to that. And at first I thought the back of my head was blown off, and I felt and found that that was all there, and I see Elmer crouched down holding his hand.

Q. And after the explosion, you took Mr. Coffey to the hospital?

A. I took him into the hospital, into Richland, yes.

Q. Did you see the object that has been marked as Exhibit 1? Do you recall seeing that object before or one similar to it?

A. Well, one similar to it. It was not quite as clean as this.

The Court: Is that 1 he is looking at?

Mr. Loney: Yes, sir.

A. The end of it didn't look like this. It seemed to be a lot of gravel around the end of it here (indicating).

Q. On the object that exploded and caused the injury did [121] you see any writing of any kind or markings?

A. You couldn't see anything on it. It was dirty, it was covered with dirt. Is this the same one?

(Testimony of Emmett N. Frederick.)

Q. Well, I think the testimony will later show it is.

Mr. Loney: Is that right, Mr. Tugman? This is the one you got from Mr. Coffey?

Mr. Tugman: That is No. 1, that has been admitted, yes.

Q. (By Mr. Loney): Have you ever seen an object resembling this? A. No, I have not.

Q. Identification 12. Was there anything about that object, Mr. Frederick, that led you to believe at that time there might be any explosive charge in it? A. No, none.

Q. You didn't have occasion to ever find any of these yourself, did you?

A. No, I have not, the first one and the last one I have ever seen.

Mr. Loney: You may inquire.

Cross-Examination

By Mr. Tugman:

Q. You say this is the first one and the last one of this type of bomb that you have ever seen? [122]

A. Outside of here, yes.

Q. Outside, you mean, this Exhibit 1?

A. The one I had in my hand.

Q. That is the only one of those that you have ever seen?

A. Yes, sir, that is correct.

Q. I see. Then, you haven't seen any of these others around this area where you were pointing, is that correct?

(Testimony of Emmett N. Frederick.)

A. I wasn't pointing at any particular area.

Q. I mean, this is the only one of this kind?

A. The one that I had in my hand.

Q. That is the only one that you have ever seen?

A. Uh-huh.

Q. Any place at any time?

A. That's right.

Q. Now, did this object change at all between the time that you first saw it and after the time that Mr. Coffey had his thumb blown off?

A. Well, it is about two years now, I believe, and I didn't pay too much attention to it, outside of the fact that it was dirty.

Q. It was dirty? A. Uh-huh.

Q. Now, you stated that Mr. Coffey had a pin and was cleaning off the ends of the bomb? [123]

A. A quarter-inch bolt, I believe it was.

Q. And he was cleaning the ends of the bomb off?

A. He had beat it with a hammer and then he was scraping at one end.

Q. Do you know which end he was scraping?

A. No, I don't,

Q. Was it the large end or the small end?

A. I couldn't honestly say.

Q. I see. Was he scraping the hole in the bomb or not?

A. I didn't observe any hole. It was sort of an indentation, looked like sort of a low spot.

Q. Did you notice what color the low spot was?

A. No, I didn't. It was dirt.

Q. About the same color——

(Testimony of Emmett N. Frederick.)

A. Looked to me like it was dirt on the end of it.

Q. Looked about the same color as the bomb as a whole, is that right?

A. Yes, just about, and he had cleaned a lot of it off in beating it with a hammer and then he was prying at the end.

Q. Now, did the hole go clear through the bomb or not?

A. Well, as I see now, it did, but at that time there was no hole in it.

Q. You don't remember, your recollection doesn't carry back to know whether the hole went clear through or not? [124]

A. Well, there was no indication to me that there was a hole in it.

Q. I see. What was he beating this bomb for? How come he was doing that?

A. To get the dirt off of it so we could melt it down.

Q. I show you the exhibit here, does that explain all those indentations and marks in the exhibit?

A. I wouldn't say that. There is a few small ones here that look like maybe hammers, but the rest of these I couldn't identify.

Q. And how did he actually explode the thing?

A. Well, I imagine when he hit the bolt with the hammer, I imagine that is when it exploded.

Q. I see. Did he have any conversation with you immediately before he hammered the thing, hammered this?

(Testimony of Emmett N. Frederick.)

A. No, I had the lead pot going, he was cleaning it off. He was working, he was down on his knees or squatting down, and there was no particular conversation.

Q. You didn't actually see him doing it, then, did you? A. Cleaning this?

Q. Well, driving the bolt through the hole in the bomb?

A. What actually hit it, no. It is probably very fortunate that I didn't, I would have got hit in the face if I had. I was watching and he was scraping away at the end. Which end, I don't know. [125]

Q. I see.

Mr. Tugman: I have no further questions.

The Court: Any other questions?

Mr. Loney: No, your Honor.

The Court: Where were you, in the basement?

A. No, we were outside his house, outside the door. I imagine we were about 15 or 20 feet from the back door.

The Court: When was that, what month?

A. It was in February, and I think it was just approximately around noon.

The Court: Oh, you had the lead pot melting the lead outside?

A. We had the lead pot outside.

The Court: Were you firing it?

A. It was a butane pot.

The Court: It was a gas—

A. A regular plumber's furnace.

(Testimony of Emmett N. Frederick.)

The Court: Gas operated?

A. Yes, butane gas.

The Court: Yes. Anything else?

Mr. Loney: No, your Honor.

Mr. Tugman: Just one further question:

Q. Why do you do this outside?

A. Well, it is not advisable to use a butane gas open flame inside, and it wasn't too cold. [126]

Q. I see. Because of the fire, then, you take it outside? A. The fire, yes.

Mr. Loney: That is all, Mr. Frederick.

(Witness excused.)

If your Honor please, I would like at this time to publish a deposition of Mr. Floyd McKnight.

The Court: All right. [127]

* * *

DEPOSITION OF FLOYD McKNIGHT

(Whereupon, Mr. Tugman read the questions and Mr. Loney read the answers of the deposition of Floyd McKnight, as follows.)

Q. Would you state your name, please, sir?

A. Floyd McKnight.

Q. And where do you live, Mr. McKnight?

A. I live out here at 5600 North Lewis.

Q. Do you have a rural delivery box number?

A. Route 8, box 200.

Q. What is your business or occupation?

A. I have a little grocery store there.

Q. At this address? A. Yes.

Q. How long have you lived in Tulsa?

(Deposition of Floyd McKnight.)

A. I come here the 7th of August.

Q. Of 1954? A. Uh-huh.

Q. And where had you lived prior to that?

A. Benton City, Washington.

Q. How long had you lived at Benton City, Washington. [129]

Q. And how long had you lived at Benton City, Washington? A. Ten years.

Q. Where had you lived prior to that?

A. Arkansas, over here at Huntsville, Arkansas.

Q. What type of work were you doing in Benton City?

A. I worked on a fruit ranch for about three years.

Q. Was that up until the time that you moved to Tulsa?

A. No, I was a ditch rider for the Sunnyside Irrigation District before I came here.

Q. And how long had you been a ditch rider?

A. Four years.

Q. Now, to be sure we get it straight, for the four years preceding your coming here, you were working as a ditch rider, is that correct?

A. That's right.

Q. Just what is a ditch rider, Mr. McKnight?

A. Well, I ride the ditches and see that each man gets his equal amount of water for irrigation purposes and maintain the ditch and keep that up. [130]

Q. And when you say "each man," you mean——

A. Each farmer.

Q. Each farmer.

(Deposition of Floyd McKnight.)

A. That has water from this canal.

Q. Under this irrigation plan? A. Yes.

Q. Now, sir, did you have occasion while doing this work as a ditch rider to find some unusual objects in a field?

A. When I found that was before I went to ditch riding.

Q. Oh, I see. When did you find these objects?

A. I believe it was in 1951, the fall of '51.

Q. What were you doing at that time?

A. I was working for W. L. Wagner, fruit rancher.

Q. How do you spell Wagner?

A. W-a-g-n-e-r.

Q. What kind of work were you doing for him?

A. Just farm work.

Q. What time of day or night was it that you first ran across these objects?

A. Well, sir, that I couldn't say. I was making trips over there daily and I just picked them up at odd times, running backwards and forth, and I wouldn't know right offhand just to the [131] time of day it was.

Q. Where was it that you found them? You say you were making trips "over there."

A. Well, they were on the Livengood place there on the pasture that I had rented from him.

Q. Is the Livengood place a ranch?

A. Yes, it is. It is a partly improved ranch, but he had some pasture there that I rented from him.

Q. What were you leasing this land for?

(Deposition of Floyd McKnight.)

A. I paid him by the head.

Q. No, I don't mean how much; for what purpose?
A. Pasture.

Q. For your cattle?
A. Yes, uh-huh.

Q. And was this right next to the Wagner place, the Livengood place?

A. Adjoins the Wagner place, yes, it does.

Q. Where, exactly, did you find these objects?

A. Well, they is a canyon that goes up through there.

Q. Up through where?

A. Through this pasture that I had leased, and around the edges of that, more or less, just surrounding the edges of this canyon on each [132] side. They canyon was small. It probably wasn't over 50 yards wide, you know, with the bushes and all that was grown up there.

Q. Over what area did you find these objects?

A. Aproximately three acres.

Q. And how many of them would you say that you found?

A. Twelve or fifteen, if they were all put together. They was more pieces than that, but I would say they was around that many, if they was all put together.

Q. Were some of them not put together?

A. That's right.

Q. What was the condition of those that were not put together?

A. Well, they was some pieces as small as two inches in diameter.

(Deposition of Floyd McKnight.)

Q. Some of them were broken up, is that what you mean?

A. Yes, and practically all of them. I only had about two that wasn't anything like all bad, the whole thing.

Q. Complete?

A. Yes, battered up and busted.

Q. Let's clarify that. How many were there of [133] twelve or fifteen that were complete?

A. Only about two.

Q. Were the battered ones battered the same way?

A. Well, no, not exactly. They seemed—they had hit on the big end. They were kind of bottle shape and——

Q. Just a minute, before we get started into that. Maybe you better describe these objects for us. Just describe them.

A. Well, they were more or less the shape of a—I would say a milk bottle, a quart milk bottle, and they, naturally, I suppose, would hit on the big end and they were most of them battered just like, you know, more or less flattened out on the bottom, and, well, they was just all shapes, those pieces were, in different sizes. That was the main thing.

Q. About how long were they, Mr. McKnight?

A. I would say around twelve inches long, just approximately. I never measured one to be sure.

Q. Were those about like a milk bottle?

A. Yes, that's right.

Mr. Tugman: Well, unless this testimony is

(Deposition of Floyd McKnight.)

qualified a little bit more, I would object to it, your Honor. So [134] far, we are talking just about objects that look like milk bottles and we just don't know what they are or where they were found.

The Court: They were found on the Livengood place, next to the Wagner place, as far as we can tell. I think we should continue on. The record may show your objection, but I will overrule it at this time.

(Reading of deposition continued.)

Q. How large were they at the largest point in width? In diameter?

A. I would guess in the neighborhood of three inches.

Q. And how large were they at the smaller end?

A. Around two inches. I would imagine they would vary about one inch.

Q. What material were they made out of?

A. Lead.

Q. Were they solid?

A. No they had a hole, through the middle.

Q. When you say a hole through the middle, do you mean running from one end to the other?

A. Yes, uh-huh.

Q. How large a hole was it?

A. About half an inch, I would judge.

Q. Now, then, was the hole empty or full? [135]

A. It was empty.

Q. Could you see all the way through the hole?

A. No. No, but those that were busted, you

(Deposition of Floyd McKnight.)

could just tell there had been a hole there, and on this larger end it looked like when it was dropped, it shattered or battered up to even if there was a hole there, it would have been battered and filled up with dirt and you couldn't have saw through it.

Q. Were there any of them that you couldn't see through? A. No.

Q. What was the nature of the material blocking the passageway? What was in the hole?

A. Just dirt and gravel and some rocks, just wedged right in there.

Q. Now, as I understand it, all of them were smashed or battered at the large end of this cylinder? A. That's right.

Q. Was there any writing or anything on the cylinder?

A. None, except one the boys found that came out there and they did find some numbers on one, but they said they were definitely Naval bombs, but [136] that is the only one that I saw that had any marks on it. Fact of the business, I had never noticed that until they found it themselves.

Mr. Tugman: I am going to object to that.

The Court: Well, I think the statement that somebody else made that they were Naval bombs should be stricken and disregarded. It will be stricken; the rest of the answer stands.

(Reading of deposition continued.)

Q. Was there any writing on any other one?

A. No.

(Deposition of Floyd McKnight.)

Q. Were there any signs or symbols or marks on any of them? A. No.

Q. When you found these, were they lying on the ground or were they imbedded, or just what condition were they in?

A. Well, some of them were imbedded there, oh, approximately three or four inches down.

Q. Into the ground? A. Uh-huh.

Q. And how were the others?

A. Some scattered pieces were laying right on top of the ground, just pieces. [137]

Q. As I understand from your prior testimony, some of them were completely smashed, strewn all over, is that correct? A. That's right.

Q. Did you examine the pieces of those that were smashed and strewn?

A. Well, not too much, no.

Q. In the examination that you did make of them, what did it disclose? What can you tell us about them?

A. Well, I don't know that there is much to tell. They was more or less mangled and they varied in size from two to three inches square and triangle and every shape.

Q. What was the condition of the soil?

A. Well, it was rough ground. It wasn't farm-able land, because that is why it was pastured. It wasn't good for orchards or anything.

Q. Was it soft or hard ground?

A. It was hard ground.

(Deposition of Floyd McKnight.)

Q. Was it rocky? A. Yes, it was.

Q. Were any of the small ends of these cylinders smashed in, Mr. McKnight?

A. No. No nothing more than there were some of [138] them that were busted completely open, but the small end didn't seem to have been battered, banged up, in any way, nothing more than just busted completely open, wide open.

Q. Those that you found stuck in the ground, which end was stuck in the ground?

A. The big end.

Q. Now, then, Mr. McKnight, you told us that you found these over an area of about three acres?

A. Yes, I judge about that.

Q. What is your best estimate of the distance between the closest of the ones that you found?

A. I would say around twenty-five feet.

Q. Is that the closest any of them were to each other?

A. I believe so. I believe so as far as scattered pieces. Any two of the larger ones, they wouldn't have been that close.

Q. What is your best estimate of the distance between the two farthest cylinders or pieces? Those that were farthest apart?

A. They would be not over 100 yards.

Q. Over 100 yards? A. Not over that.

Q. Would it be much under 100 yards? [139]

A. Well, some of them, but the farthest one, I wouldn't think, the farthest east, I don't believe would have been over 100 yards.

(Deposition of Floyd McKnight.)

Q. You stated it wouldn't be over 100 yards——

A. No.

Q. ——is that right?

A. I wouldn't think so.

Q. About how far would it be from the one at one edge of the field to the one at the farther edge of the field?

A. I would say that is about it.

Q. About what, Mr. McKnight?

A. About 100 yards.

Q. How much would you say these objects weighed, Mr. McKnight?

A. I would judge in the neighborhood of five pounds. Now, that is just an offhand guess. I never weighed one and, fact of the business, like I said, with only two whole ones which I had, but I think around five pounds. It could have been heavier quite a bit than that, but I just—that would just be my judgment.

Q. Now, Mr. McKnight, did you, at my request, draw a diagram in which you set forth the dimension and general shape of these cylinders? [140]

A. Yes, I did, to the best of my knowledge.

Q. Now, this yellow piece of paper marked Exhibit "A," to which you have signed your name, is that the drawing you made for me?

A. Yes, it is.

Mr. Athens: Okay, we will introduce that into evidence.

(Deposition of Floyd McKnight.)

Mr. Loney: I think that is right here.

The Court: Well, the Clerk will mark it as an exhibit.

Mr. Loney: Should I remove it from this, your Honor?

The Court: Yes, you may remove it.

The Clerk: Plaintiff's Exhibit 13.

Mr. Tugman: It would be for identification, wouldn't it?

The Clerk: For identification.

The Court: For identification.

Mr. Loney: You have seen it, Mr. Tugman?

Mr. Tugman: I haven't seen it. No, I haven't seen it.

I presume he means this is a hole here, is that correct (referring to Identification 13)?

Mr. Loney: Yes.

Mr. Tugman: I guess that is what it is. I have no [141] objection.

The Court: You have no objection?

Mr. Tugman: No.

The Court: It will be admitted, then.

It is time for recess. We have been in session an hour and a half. Court will recess for ten minutes.

(Whereupon, the said drawing was admitted in evidence as Plaintiff's Exhibit No. 13.)

(Whereupon, a short recess was taken.)

The Court: Let's see, we are still on Page 11 of the deposition, aren't we?

Mr. Loney: Yes, sir.

(Deposition of Floyd McKnight.)

The Court: This exhibit was admitted, I think, wasn't it? Yes, 13. Let's see, we are at the bottom of Page 11.

Mr. Loney: Yes, sir.

The Court: Or on 12?

Mr. Loney: The last question on 11.

(Reading of deposition continued.)

Q. Mr. McKnight, did you ever clean the hole out of any of these cylinders?

A. No, I didn't. Fact of the business, I was really afraid of them after I found out about [142] this guy getting hurt with this one.

Q. Let me ask you this question: Did you have any reason to believe that they might be dangerous?

A. Not until after he got his thumb blown off from this one.

Q. At the time you found them, did you have any reason to believe that they might be dangerous?

A. None whatsoever, no.

Q. What did you do with them?

A. I threw them back in a pile of junk that I had there and I sawed one with a hacksaw and made a little washer for an outfit that I was fixing there for the weir blade, for the water delivery.

Q. You cross-sectioned it, in other words?

A. Yes, I did.

Q. Did you use these for any other purpose?

A. No. No, I didn't bother them.

Q. How many of them did you take with you?

(Deposition of Floyd McKnight.)

A. Oh, I would imagine they was a dozen, altogether, twelve altogether.

Q. That you took home with you? A. Yes.

Q. Did you pick them all up at the same time? [143] A. No.

Q. Over what period of time did you pick them up?

A. Oh, just about three or four months, something like that, just different times that I was crossing back across the pasture and I would pick them up here and there.

Q. Mr. McKnight, what was the color of these objects?

A. They were just a dull lead color, the best I could describe one.

Q. Were they readily visible?

A. Well, you would almost have to be looking for them or just stumble right on one, the way they could be hidden. They was lots of grass there growing. They wouldn't be shown up for any distance, no.

Q. Were there any fins on any of these cylinders? A. No, they wasn't.

Q. Was there a nose on any of them?

A. No.

Q. Were there any depressions or indentations or slots to which anything might have been attached to these fins?

A. Nothing more than right on the big end, they looked like, after I examined one a little [144] closer, that they were a pin that held something,

(Deposition of Floyd McKnight.)

like a shotgun shell or firecracker, right in the big end there.

Q. In the hole that you were telling us about?

A. Yes, uh-huh.

Q. This pin, which direction did it go?

A. Just directly through the big end of it, straight through.

Q. Was it perpendicular to the hole?

A. Yes, that's right.

Q. What kind of a pin was it?

A. Just a steel pin.

Q. At any time, in any of the holes in any of these objects, did you find the pin going through anything?

A. No. No, I didn't examine them that close.

Q. You stated that the pin went through a shell or a firecracker there?

A. Yes, they was some red paper in there, looked more or less like it could be around a firecracker or shotgun shell, something of that sort.

Q. If I understand you correctly, there was a wrapper? A. Yes, uh-huh. [145]

Q. A red paper wrapper?

A. Yes, that's right.

Q. How many of these red paper wrappers did you find?

A. Oh, I imagine five or six, something like that. Those that were completely blown up, you didn't see no sign of that.

Q. Now, in which ones did you find the wrapper?

A. The ones that just wasn't busted open and

(Deposition of Floyd McKnight.)

the big end wasn't completely busted open, maybe had been broke in half and part of the paper would be sticking up there.

Q. Mr. McKnight, if they had been completely bursted, there was no paper, is that correct?

A. That's right.

Q. If they were intact, there was no paper?

A. No.

Q. Is that corect? A. Correct.

Q. It was only where there was only half of the cylinder left, that the paper protruded, is that correct? A. Yes, uh-huh, that is right.

Q. And was it still in the shape of a cylinder, the paper? [146]

A. Uh-huh, yes, it was.

Q. Do you own a shotgun? A. Yes, I do.

Q. With relation to the size of a shotgun shell, what size was this wrapper?

A. I judge it would be about the size of a .12 gauge shotgun shell. It might be larger, but that would be my guess.

Q. Was there a Navy air base near the Wagner place?

A. I didn't know just where it was. These boys, these soldier—Army soldier boys, they told me they were one just across the mountain over there, but just the exact location I wouldn't know that.

Q. Are you familiar with the location of a field used by the Navy for a bomb target practice?

A. No, no, I am not.

Q. After you took these objects home with you,

(Deposition of Floyd McKnight.)

when was the first you heard anyone say anything about them?

A. I didn't even realize them being dangerous until this here Coffey, he was one of my water users that I delivered water to, and I heard that he had gotten blown up with something [147] over there, and I thought it was dynamite and I went by to see him and he was telling me about some object that he was fooling with and it blew up on him, and he taken me and showed me a piece he had left, and I said, "Well, Jesus, I have got some of those over there and I sawed one in two with a hacksaw." And that was my first time even thinking anything about them being dangerous.

The Court: I think that part about what Mr. Coffey told him should be stricken. The fact that he saw a piece over there should stay, what he saw over there.

All right, go ahead.

(Reading of deposition continued.)

Q. When was that?

A. That was in 1953. I believe it was June of '53. I am not positive.

Q. When did Mr. Coffey have his accident?

A. I believe it was in June of 1953, wasn't it?

Q. What did you do, Mr. McKnight, when you heard about Mr. Coffey's accident?

A. Well, I gathered those pieces that I had very carefully and I taken them off up a little old canyon of a thing there and I buried them, so the boys

(Deposition of Floyd McKnight.)

wouldn't get hold of them. I had [148] some boys there and I was afraid they might get to playing with them.

Q. Your children, you mean? A. Yes.

Q. Where had they been all this time?

A. They had been off there in the junk pile at the house, just junk there, odds and ends.

Q. When was the next you heard of them or saw them?

A. Well, Mr. Coffey, he wanted to get hold of some and I went up there and dug out two or three pieces, and I don't remember the exact amount, but I taken some over there to him.

Q. When was it that you saw the Army or Navy people?

A. Well, it was just shortly after that he got his—got blown up with this one and there were three Navy guys that came there and they asked if I had some and where I found them, and I told them and they wanted to look at them.

Q. Where were they then?

A. They were in the junk pile there by the house, near the garage.

Q. Now, when you say it was shortly after this [149] accident—— A. Uh-huh.

Q. ——was it before you had talked to Mr. Coffey?

A. I don't believe I had. Let's see, I had heard about it, but I am not sure if I had talked to him or not.

Q. At the time the Navy people came to see

(Deposition of Floyd McKnight.)

you, you had no idea that the Coffey accident had been caused by these cylinders? A. No, no.

Q. Did the Navy boys tell you why they wanted to look at them?

A. No, they told me they was investigators, that is all they told me, and they insisted on taking them along with them, and I told them they wasn't in the way any and that I would just keep them.

Mr. Tugman: This is all hearsay, but I won't object, your Honor.

The Court: All right.

(Reading of deposition continued.)

Q. Tell us if you can, Mr. McKnight, how they found out you had these cylinders?

A. Well, I really don't know.

Q. Had you talked to anyone about it? [150]

A. No. No, I hadn't.

Q. Do many people come to your place, where you were living?

A. Oh, yes. Yes, they is lots of people there.

Q. This was while you were ditch riding?

A. Yes, it was.

Q. Was it with relation to the irrigation work that people would come to your place?

A. Yes, uh-huh. Yes, any complaint about water or anything, they would come in there, and then I had several guys working on a canal and all the time they was back and forth, and it was quite a public place.

Q. Were there any Navy personnel that came to

(Deposition of Floyd McKnight.)

your place, other than these men, prior to the time that these men came? A. Not that I knew of.

Q. Did the Navy men take any of the cylinders with them? A. No.

Q. Now, how long after that was it that you talked to Coffey?

A. I just don't remember offhand for sure.

Q. When did you talk to the Army people?

A. Just the exact date, I wouldn't know. [151]

Q. Well, now, what I mean, Mr. McKnight, is with relation to when you talked to the Navy people, when you buried them and when you talked to Mr. Coffey?

A. I would say about a week after these Navy guys was there, these Army guys came there, one colored lieutenant, and they also asked about them, and I think they had gone by and seen Coffey—I am not sure of that—but, anyway, I taken them out and showed them out and showed them what I had, and this here colored lieutenant, he did find these numbers on there and he said they was definitely Naval bombs, is what they were.

Mr. Tugman: I will object to that.

The Court: Yes, I think that should be stricken as hearsay, what the lieutenant said, that part of it.

(Reading of deposition continued.)

Q. Had the Navy personnel seen the numbers?

Mr. Tugman: I will object to that, too, and the answer to that question.

(Deposition of Floyd McKnight.)

The Court: Well, I think he can testify that he looked at the numbers and I will let that stand. Overrule the objection.

(Reading of deposition continued.) [152]

A. They didn't say anything about them. They looked at them, but they didn't say anything about them.

Q. Did you notice the numbers on this one cylinder at the time the Navy personnel were at your place?

A. No, I didn't even realize there was one on them until this lieutenant found this one.

Q. Do you know, Mr. McKnight, whether or not the Navy people saw the number?

A. I don't know. They looked at them. They first told me that they couldn't be theirs, they thought—they wasn't, rather, and I told them they definitely was theirs, I thought, or knew, rather, and they admitted they was, but it was an older type bomb than what they had prior to the present time.

Mr. Tugman: I will object to that statement.

The Court: Yes, I think that should be stricken as hearsay. It is conversation.

(Reading of deposition continued.)

Q. The Navy personnel, then, did say that these were bombs?

A. Yes, uh-huh, but they was an older type than they had at the present time. [153]

(Deposition of Floyd McKnight.)

Q. When was it that you first learned that they were bombs?

A. Just when I heard—when I went and talked to Coffey and found out—and he showed me that one and I knew that was explosive, but I didn't realize they was bombs until after this here lieutenant told me they was.

Mr. Loney: Your Honor, perhaps I am a little late in this, but I think the testimony will show later that the Naval personnel involved was headed by Commander Ridenour, and I think the statements he made as to the existence or identity of a certain object would be binding upon the government. I just wanted to point my feeling out to your Honor. Excuse me.

The Court: Well, I don't think there is much question but what this one that is in evidence constituted a type of bomb that was used in the Navy. At least, that is what the Sergeant testified, so this would be cumulative.

Mr. Loney: That's right.

Mr. Tugman: I would object to this testimony.

The Court: I have ruled in your favor on that. It is hearsay, it should be stricken out.

(Reading of deposition continued.)

Q. Perhaps I confused you with my question, Mr. McKnight. Didn't you tell me that you [154] talked to the Navy people before you learned of Mr. Coffey's accident?

A. I am pretty sure of that, yes.

(Deposition of Floyd McKnight.)

Q. Didn't you say that the Navy people told you this was a bomb? A. Yes, that's right.

Q. Then, didn't you know that it was a bomb before you talked to Mr. Coffey?

A. Yes, uh-huh. That's right.

Q. Were you not, then, somewhat apprehensive when you learned that they were bombs?

A. Yes.

Q. Did you do anything with them at that time?

A. Yes. I taken them up there, as I said, in the canyon up there and buried them.

Q. Then you buried them before you talked to Mr. Coffey, is that correct? A. Uh-huh, yes.

Q. You were mistaken before when you said it wasn't before you talked to Mr. Coffey?

A. Yes, uh-huh.

Q. Did you bury them before the Army personnel came or after the Army personnel came?

A. After. I don't know if it means anything or not, but these here Army boys, they insisted [155] on taking some of those along with them, and they took the two good ones that I had to clean them up and they said they would bring them back, but they never brought anything back. I let them take those two whole ones that I had along with them.

Q. The Army took the two whole ones?

A. That's right.

Q. Which ones did Mr. Coffey get?

A. Just some various pieces that I had left there, but they wasn't a whole one in the bunch.

(Deposition of Floyd McKnight.)

Q. Where did you get those pieces, Mr. McKnight?

A. At the same place I got those, just scattered around.

Q. I mean, were they in your junk pile when you gave them to Mr. Coffey, or did you have to get them where you had buried them?

A. No, I went back and got them where I had them buried. I went up there and dug them out.

Q. Mr. McKnight, you have signed a statement concerning this matter, have you not?

A. Yes, I did.

Q. If there are any discrepancies between the statement and what you have said here under [156] oath, what you have said here under oath is correct, is it not?

A. Yes, uh-huh.

Q. The statement you made prior hereto was not made under oath, was it?

A. No. No, it wasn't.

Q. How long have you known Mr. Coffey?

A. Just while I riding ditch there, just a short time.

Q. Were you riding ditch at the time that Mr. Coffey was hurt?

A. Yes, I was.

Q. Is he a good friend of yours?

A. No.

Q. Was he a good friend of yours?

A. No; nothing more than just one of the customers, that is all. Maybe I should have said one of the water users, which is all the same.

Q. Were you paid by him?

A. No.

Q. By whom were you paid?

(Deposition of Floyd McKnight.)

A. Sunnyside Irrigation District.

Q. Did these cylinders appear to have been handled by anyone?

A. No. No, just offhand I would have [157] thought they would just have been dropped right there.

Mr. Tugman: I am going to object to that. It is opinion evidence and I don't think he has been qualified as an expert to give an opinion on whether or not they had been dropped or handled.

The Court: I will strike that, the conclusion as to whether they were dropped.

(Reading of deposition continued.)

Q. Did they appear to have been carried there by anyone?

Mr. Tugman: I will object to that, too.

The Court: I will let that stand.

(Reading of deposition continued.)

A. Well, no, I wouldn't have thought so.

Q. If they had been carried there, somebody must have sat on them after they got there?

A. Yes. It more or less looked like that this little canyon had been their target. There is a short canyon there and those pieces, what I found on each side, was where they missed their target. That is what it just struck me after I found out they were explosive.

Mr. Tugman: I am going to object to that. [158]

(Deposition of Floyd McKnight.)

The Court: I think that should be stricken as a conclusion.

(Reading of deposition continued.)

Q. Did you ever go down into the canyon, Mr. McKnight?

A. No, it was impossible to walk through there, even get in there. There was so much undergrowth and grass, too rough.

Q. Was there anything to indicate that these cylinders might contain an explosive?

A. No, not right offhand.

Q. How old were your boys at the time you found these?

A. They was about eleven and thirteen.

Q. You most certainly would not have taken them home with your boys there if you had thought they contained explosives, would you?

A. No, I would not.

Mr. Tugman: I will object to the form of that question.

The Court: Well, it is a leading question. I don't know whether you reserved the right to object to the form of the questions. It is leading. I will sustain the objection. He has already answered the same thing.

(Reading of deposition continued.) [159]

Q. You would not have fooled with them at all, if you had thought they were explosive?

Mr. Tugman: Same objection.

(Deposition of Floyd McKnight.)

The Court: Well, I will sustain the objection to that and to the next question.

(Reading of deposition continued.)

Q. With relation to the place where you found these, where was the nearest house, farm house or building of any kind?

A. Well, there had been a rent house of Livengood's there, it was around a quarter of a mile.

Q. Was that the nearest improvement?

A. Yes, it was.

Q. Now, to set the record straight, you say the Wagner place and the Livengood place were next to each other? A. Yes.

Q. And where did Mr. Coffey live with relation to—— A. He lived about a mile north.

Q. Of which place?

A. Of the Wagner place and this Livengood place, too. The Wagner place and this Livengood place, they joined. [160]

Q. At the time you found these bombs, was Mr. Coffey living near there?

A. No. No, I don't believe he was. I don't believe he had moved there.

Q. Is there anything else that you could tell us about this, we haven't asked you?

A. I wouldn't know of anything that would be important. [161]

* * *

ELMER G. COFFEY

a plaintiff herein, called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

By Mr. Loney:

Q. You are Mr. Elmer G. Coffey, one of the plaintiffs in this action? A. That is correct.

Q. Mr. Coffey, you have heard the testimony that Mr. McKnight just gave by deposition here. I am going to hand you the article that has been marked, or the [163] articles that have been marked as Identifications 11, 9, 10 and 2, and ask you to tell the Court where you got these.

A. These are the pieces that Mr. McKnight brought to me.

Q. And they were in your possession then until you gave them to me?

The Court: That is 2, also?

Mr. Loney: Yes, your Honor.

The Court: Yes, all right.

Mr. Loney: I offer these by way of illustration. They weren't the ones that caused any damage.

Mr. Tugman: Well, I will object to those on the basis that they have not been identified as to the area that they were found or located with any definity at all.

The Court: These are the same ones Mr. McKnight testified in the deposition he found on the Livengood place and then took over to Mr. Coffey, and Mr. Coffey has just testified that he got them

(Testimony of Elmer G. Coffey.)

from Mr. McKnight, so they have been identified as to where they came from.

Mr. Tugman: I will withdraw the objection, then, and qualify it to show that those are what Mr. McKnight found, if they are not admitted for the purpose of showing that they are Navy bombs or Army bombs or anything of that nature.

The Court: Well, they will just be admitted on the [164] basis of what they are and having been identified, and all the testimony will apply to them as to what they are, all the material testimony.

Mr. Tugman: Yes.

The Court: They will be admitted, then.

(Whereupon, the said objects were admitted in evidence as Plaintiff's Exhibits Nos. 2, 9, 10 and 11.)

Q. (By Mr. Loney): Are you familiar with the Livengood and Wagner places, Mr. Coffey?

A. Yes, I am.

Q. Have you observed on this map the area that your brother-in-law, Mr. Osborne, marked as indicating——

The Court: What were those numbers again, Mr. Granger?

The Clerk: 2, 9, 10 and 11.

The Court: All right.

Q. (By Mr. Loney): The area that is initialed here by Mr. Oliver Osborne as being the area in which he discovered the bomb, are you familiar with that area? A. Yes, I am.

(Testimony of Elmer G. Coffey.)

Q. Do you know who owns the property in that immediate vicinity? [165]

A. Well, the property to the right, facing north, would belong to Wagner, although he has recently sold. I don't know the name of the new owner. The property to the left, facing north, would belong to Livengood, who still resides there.

Q. You may resume the stand.

The Court: Let's see, I am not sure that I understood that testimony without having the map to look at. If you wish to come up here, Mr. Tugman, I just wanted to have the witness point out to me on the map here so I can follow the testimony a little better.

Let's see, this is upside down. Here is the Yakima River.

A. This is north in this direction (indicating).

The Court: Yes. I used to be a surveyor, I can do better if I look up north.

A. North comes this direction. This particular vicinity belongs to Mr. Wagner, or did at that time, and this belongs to Mr. Livengood (indicating).

The Court: I see, all right.

A. See, they adjoin.

The Court: Yes, all right.

Q. (By Mr. Loney): Mr. Coffey, I am now showing on the screen an article that has been marked as Identification 4—— [166]

The Bailiff: Would you like the lights out?

The Court: Yes, I think it would show up better. Pull down that shade.

(Testimony of Elmer G. Coffey.)

Q. (By Mr. Loney): Are you familiar with the area that is shown in that picture, which has been marked Identification 1? A. Yes, I am.

Q. Can you see the Yakima River in that picture? A. I can.

Q. And do you know the direction in which you are looking? A. South.

Q. Looking south. Did you accompany me when that picture was taken? A. I did.

Q. Do you know where we were standing at the time the picture was taken?

A. We were standing on the Livengood place, to the left side of the canyon.

The Court: What number is that?

Mr. Loney: 4, your Honor.

Q. Is that a fair representation of the draw that runs between the Livengood place and the Wagner place? A. Very fair.

Q. The foreground, that appears to be a light brown, is cheat grass? [167]

A. Probably the pasture Mr. McKnight referred to.

Q. Pasture. You will notice to the left of the picture—or to the right of the picture—what appears to be a shelter, a house, dwelling. Is that occupied?

A. That was not occupied. That is across the road.

The Court: Of course, that cut that shows there, is that the road? A. That is the road.

(Testimony of Elmer G. Coffey.)

The Court: You are pointing to the road now, aren't you?

Mr. Loney: Yes, sir, and the river is this location right here (indicating).

The Court: I see.

Mr. Loney: Now I will show what has been marked as Identification 3. Is that in focus, your Honor?

The Court: Yes, I can see that very well.

Q. (By Mr. Loney): Mr. Coffey, do you recognize that picture?

A. I believe I do. It is farther north than the other position, sort of around the bend. We are still looking south.

Q. Still looking south and we are still on the Livengood place?

A. Yes, sir, we are still on the Livengood place.

Q. Now I am pointing to a location in the far distance [168] over here. Do you know what that is?

A. That is the Yakima River.

The Court: Are those orchard trees up on the ridge there?

A. Yes.

Q. (By Mr. Loney): I will ask you first if that is a fair representation of that particular area?

A. It is, indeed.

Q. Do you recognize Identification 5, Mr. Coffey?

A. I believe that is the view looking north, and the road would probably be to the right and down below us. No, it is quite complicated, let me study it just a minute.

Yes, I believe that is correct.

(Testimony of Elmer G. Coffey.)

Q. Are you familiar with the portion right in here?

A. Yes, I'm sure that's right. That is the heavier cherry orchard that is back in there, and the light trees in front are apricots, much younger.

Q. And the picture was taken from the——

A. Almost from the highway, looking north.

Q. And would be from whose property?

A. On Livengood's again.

Q. And we are looking at the Wagner property to the right of the picture?

A. Wagner to the right, Livengood to the left.

Mr. Loney: Counsel, to save perhaps time, would you [169] like here to examine as to these pictures before I offer them?

Mr. Tugman: Frankly, I can't see the materiality of them. I can't see that they have been identified by anyone who can state that this is the area where those bombs were found, having found them there.

I see no objection to them, but I can't see that they are particularly material, just showing the Livengood ranch at random.

Mr. Loney: If your Honor please, I believe the testimony shows that they were found in the draw that separates the two farms and this is a picture of that draw.

The Court: The exact spot, perhaps, isn't shown, but the general area certainly is, according to the deposition testimony, I should think.

(Testimony of Elmer G. Coffey.)

Mr. Loney: We offer them only to show that general surrounding area, not to show——

The Court: Not to show the exact spot.

Mr. Loney: That is correct.

Mr. Tugman: With that reservation, I have no objection.

Q. (By Mr. Loney): You didn't find any of these objects yourself, did you, Mr. Coffey?

A. No.

Q. And you don't know of the exact [170] location? A. I don't have anything.

Mr. Loney: I guess that is all, we can turn on the lights.

The Clerk: Are they admitted?

The Court: If you are offering them, I think they should be admitted.

Mr. Loney: Yes.

The Clerk: 3, 4 and 5?

The Court: That's right.

(Whereupon, the said colored slides were admitted in evidence as Plaintiff's Exhibits Nos. 3, 4 and 5.)

Mr. Loney: Counsel, do you have any reason to want to refer to these pictures, or do you know yet?

Mr. Tugman: I can't think of any reason at all why I should refer to them.

Mr. Loney: I will return this equipment tonight, then, if I may.

Mr. Tugman: Yes.

The Court: All right.

(Testimony of Elmer G. Coffey.)

Q. (By Mr. Loney): Mr. Coffey, will you describe what occurred on the day that you sustained your accident?

A. Mr. Frederick came out to visit me. I had the sheep up [171] at the upper end of my place. He came up about—oh, about 11:30. We ran the sheep back into the corral and made our preparations to melt lead. He had obtained a regular lead melting pot and we cast quite a few bullets, .38's. He didn't know much about it and he wanted to learn. He had asked me some time before, a week or so before, if I would show him how I did it, because he was planning on buying the equipment and he had a gun to fire them in.

So we started casting bullets, I should judge, about 12 o'clock, about 12:10, perhaps. We ran low on lead and I decided that I would go down in the basement and get some more lead, and I thought perhaps if he wanted to try some higher velocity stuff, that I had this piece of lead had been laying there and I had scratched it before; in fact, I had examined it two or three times since they had brought it to me, and I realized it was composition lead, as the Sergeant pointed out, and it is harder than ordinary lead and would be very good to use for something that you wanted to put a gas check on and perhaps work up to about 2,400 feet.

Anyway, I went down in the basement and picked up the piece of lead and brought it out and I showed it to him and said, "Well, I guess we'll put this one in, [172] but it is dirty. If we put it in the pot

(Testimony of Elmer G. Coffey.)

now, that is something you must watch. If you put anything dirty into a lead pot, you will have a small explosion, it is liable to boil up into your face, so always clean your lead thoroughly before you put it in the pot."

I said, "Perhaps we can beat this off and clean off the outside and look it over." And I laid it down in front of me and beat it with a hammer, and the ends of the pieces were heavily encrusted with dirt and pebbles and sand, both ends. I thought perhaps they weren't packed in too tight, I probably could shake them out, so that was one of the reasons I beat it. The other was to beat the encrustation off the outside of it. I picked it up and shook it and certain parts of it fell off, all right, but the ends seemed to be stubborn, seemed to be packed quite solid, so I took this piece of iron pipe—I went over to the junk pile and picked up a piece of iron pipe and thought, well, I'll scratch it out with that or beat it out.

Being in a hurry, we wanted to get the thing done, seems like I'm always in a hurry, so I scratched the ends of it a little bit and scratched them loose. It was a little stubborn, wouldn't come out. Some came out, lots of dirt, and so on, but I saw that process was going to be so slow, so I looked at the thing and [173] reasoned, well, here is this lead cylinder and there is dirt in one point and there is lead around it. Naturally, there is a hole there and the diameter of the hole, and so on, looks to me like from both ends about the same, so it is reasonable

(Testimony of Elmer G. Coffey.)

to suppose the hole goes clear through. Okay, I will just punch it on out, so I got myself this pin and a hammer and I went to work on it. I punched it in, punched it in, and it must have went in about three inches. It was the fourth blow because I counted them. It helps whenever you hit with a hammer to count the blows. It does me, I always count whenever I hit with a hammer. I counted four blows that was it, it blew up.

I remember I had my thumb holding that rod over the end of it and it was in a position, perhaps, about like this to me (indicating). I was really swinging the hammer to it. And Mr. Frederick was on the other side, however, standing just about the same distance away from it as I was. The pot was making some noise. If it doesn't burn properly, it gives off a very loud noise and you adjust it and it burns quietly, so he reached down to adjust it about the time it went off. There was just a terrific jar on my hand. I supposed I had got myself into something some way or other. I didn't realize what fully happened. Of course, I [174] wouldn't.

Q. Then you were taken to the hospital?

A. The thing has been covered, I think.

Q. You were treated there by Dr. Armstrong?

A. Armstrong.

Q. You heard the testimony of your two brothers-in-law, Mr. Osborne and Mr. Osborne, and about them finding this object, and referring to the object that has been marked as Exhibit 1, does that

(Testimony of Elmer G. Coffey.)

appear to be either the object or something similar to it?

A. I believe that this is the object, as I could see—I can't see them as plain—they seem to be beaten all over. I imagine I turned it as I beat it, too, to shake it, get it off on all sides.

The answer to your question is, yes, I believe that to be the object.

Q. Was there anything about this object at that time that led you to believe it had any kind of an explosive or was dangerous in any way?

A. Absolutely nothing. It was simply an old, dirty hunk of lead.

Q. Had you been familiar with bombs or anything that remotely resembled that?

A. Absolutely not. I have never seen a bomb, I don't believe. [175]

* * *

Q. (By Mr. Loney): Mr. Coffey, you were visited by some personnel in the Naval organization?

A. That's right.

Q. After the accident?

A. After the accident.

Q. And, without telling what they said, what did they do when they came to your property?

A. Took the bomb.

Q. Did they request that you furnish it?

A. They asked for my permission for the bomb.

Q. You had, I believe, another one of these?

A. Yes, I did.

Q. Did you give that to them, also?

(Testimony of Elmer G. Coffey.)

A. No, my boy—I believe it was my boy—dropped that in the old fashioned toilet when he heard I was hurt. He came home and he went down in the basement, he felt pretty bad, he said, “This will never hurt anybody else,” so he dropped it in the toilet, old fashioned toilet.

Q. And this object, then, that is Exhibit 1——

A. Is the only one I have left. I mean, that is the disposal of the two.

Q. Had you seen any such objects, other than those two [187] objects, before the accident?

A. No, nothing—I have seen things that looked like those, yes, many—not many, but several.

Q. Before the accident?

A. Not bombs. Before the accident, yes. Nothing—I have seen objects similar to that, I might say. I will explain.

At Benton City they have a current-measuring device and there is an object looks exactly like that hanging on the end of a cord down to the river to measure the current. I guess that is what they are doing. I drive by there once in awhile and see that going up and down. It looks slack.

Q. Like a plumb bob?

A. Yes, that is it. I have seen large lead sinkers that look a great deal like that, over in Seattle, fishing sinkers. Too expensive now, they don't use them much any more. Some of the big fishing boats had heavy sinkers like that in general appearance.

Q. And were you aware of the names of these men who came out to see you?

(Testimony of Elnér G. Coffey.)

A. Yes; Porter, Call, and there was another gentleman that did what he is doing. I have forgotten his name, Reynolds, I believe, or something.

Q. Ridenour? [188]

A. Ridenour, that was probably it.

Q. After the accident then you discovered the true nature of these objects?

A. That is correct.

Mr. Loney: I have no further questions.

Cross-Examination

By Mr. Tugman: [189]

* * *

Q. Now, this other bomb you testified to, was it similar to the one here that is labeled Exhibit 1?

A. The bomb that was disposed of?

Q. Yes. A. It was similar to that one, yes.

Q. Longer, shorter?

A. About the same, I would say, there would be no difference.

Q. Same type of material?

A. Same thing exactly, I couldn't see any difference between the two of them.

Q. I see. Now, is this Exhibit 1 approximately the same shape now as when you first saw it?

A. Must be exactly the same shape. How could it change? I'm sorry.

Q. That is what I am asking.

A. I am supposed to answer the questions. I'm sorry, but it is exactly the same shape.

(Testimony of Elmer G. Coffey.)

Q. It is. Did you observe, when you first saw it, these [198] marks here (indicating)?

A. Well, when I first saw this, it had considerable dirt over each end of it. Very possible that I saw the marks on it, I don't know, I couldn't recollect that exactly.

Q. Do you recollect whether you saw these little holes right——

A. I couldn't answer that statement because these holes had all been covered with dirt. This thing was dirt flush with the surface.

Q. The dirt was flush with the surface?

A. Flush with the surface in both ends.

Q. I see. Now, you stated that you tried to dig the bomb out a little bit? A. That's right.

Q. How much digging did you do?

A. Just scratched it to see if the dirt would roll out of it fairly easy and it was too hard to get out that way, too slow.

Q. How much dirt did you get out of it?

A. Oh, third of a teaspoon.

Q. Third of a teaspoon. How much did you uncover, how much of the hole?

A. Just enough to see the edge there so you could come to the conclusion the hole ran right through it. [199]

Q. You could come to the conclusion the hole ran through it. Was there a hole at the other end of the bomb?

A. There was no hole, it was flush, but you could see where the color of the dirt and the color of the

(Testimony of Elmer G. Coffey.)

lead was different. If you would fill this with dirt, you could tell the hole ran clear through it.

Q. Now, which end did you run——

A. I can't positively guarantee that, but it would seem that—I would hold the heavy end like this, I do believe (indicating).

Q. So you probably ran it through the heavy end, is that right?

A. I probably ran it through the heavy end.

Q. And in your cleaning off, did you notice any other little metal objects that were appended here at all in the head of the bomb?

A. No metal objects at all.

Q. And you don't know whether or not you noticed any hollowed places there other than the hole, is that correct?

A. Well, the places like this, possibly (indicating). I can't say that I paid any particular attention to them, no. Why would—sorry.

Q. You heard the Sergeant testify, did you not?

A. I did. [200]

Q. You heard me ask him to put the pin from this bomb into Exhibit 1 there? A. Uh-huh.

Q. And, if you recall, he was able to insert this pin in there. I might ask you to look at that and see if you can find any place that that pin would go?

A. Yes, I saw him stick the pin in something like this, I imagine (indicating). There.

Q. Now, then, Mr. Coffey, did you see anything that resembled that? A. I did not.

Q. Did you see any holes where that pin might

(Testimony of Elmer G. Coffey.)

have gone. Did you see that particular position where that pin is fitting now?

A. That pin is below the surface of the bomb. I didn't see anything below the surface of the bomb because I didn't get in that far.

Q. Well, do you observe that those openings come out on to the side of the bomb?

A. No, they don't come out on this side of the bomb.

Q. Did they come out on one side of the bomb?

A. Well, the pin comes out on this side.

Q. Well, did you notice any holes there?

A. No. Wouldn't notice a hole that small if it was covered with dirt. [201]

Q. Did you notice any machined areas around that head of the bomb?

A. No machined areas.

Q. But you did clean off the head of the bomb there to some degree?

A. I scratched at it to see if the dirt and stuff was solid. It was too solid to get out scratching so I beat on it. That was my sole purpose in scratching on it.

Q. How much beating did you do?

A. I hit it four times good and hard.

Q. I mean before.

A. Before? I don't remember. I threw it down and beat it maybe for two or three minutes, just knocked the crust off the sides of it. It was covered with dirt, all over.

(Testimony of Elmer G. Coffey.)

Q. And you were able to knock quite a bit of the crust off?

A. I knocked off some and I saw that I was not getting anywhere because the dirt seemed to be fastened to the ends, rather than to the sides, so I concluded I would have to work on the ends.

Q. I see. Now, did the explosion of the bomb blow any pieces of the bomb off, do you know?

A. It couldn't have blown any pieces of the bomb off. [202]

Q. Well, did it? A. Did it, you say?

Q. Yes. I mean, was the bomb any longer before the explosion?

A. Before the explosion, was the bomb any different? It wasn't any different than this. No, I don't see it would be any different than this.

Q. Did you hear your brother-in-law testify, A. J. testify? A. Yes.

Q. Do you remember his testimony that the bomb might have been a little bit longer before the explosion?

A. I also heard him say that mortar shell was this long, too (indicating), and it isn't.

Q. That isn't what I asked you. Did you hear him say the bomb might have been a little longer before the explosion?

A. I heard him say that.

Q. Would you agree with that?

A. No, I wouldn't agree with it.

Q. Here, I will relieve you of that. It is a pretty heavy item.

(Testimony of Elmer G. Coffey.)

Did you see anything that looked like corrosion down in that hole?

A. Corrosion in the hole? [203]

Q. Yes.

A. I saw dirt in the hole. Dirt and corrosion are about the same sort of a proposition to me.

Q. I see.

A. Corrosion was probably what was on the outside of the bomb that I was trying to knock off, too, and it was dirt and corrosion. I mean the same thing when I say dirt.

Would it be possible for me to say a little more?

The Court: No, just wait until questions are asked. Your attorney will have redirect examination if you wish to make any explanation.

A. Oh, that's right. Asking him questions, I realize I shouldn't do that, that is impetuous. That is the trouble with me, I do things too quickly.

The Clerk: This will be Defendant's Exhibit 14 for identification.

The Court: 14?

The Clerk: 14.

The Court: All right.

Mr. Tugman: Mr. Loney says that might not be deactivated so we will handle it very carefully.

The Court: All right.

Q. (By Mr. Tugman): Showing you Defendant's Identification 14, do you recognize this [204] object? A. I do.

Q. Where does it come from?

A. That came from the bombing range. That is

(Testimony of Elmer G. Coffey.)

hearsay with me, I obtained it from a friend of mine.

Q. You got it from a friend of yours?

A. Yes, sir.

Q. I want you to observe this Defendant's 14. I will just keep it here so we won't be passing it back and forth. Do you observe anything around the head of the——

A. I observe the pin that you are speaking of now.

Q. Now, would you say that the appearance of this particular bomb looks pretty much like the bomb, Exhibit 1, prior to the time that you exploded it?

A. No, I wouldn't, I wouldn't say that at all. I would say it looks entirely different.

Q. Would you say there is quite a bit of foreign matter in there (indicating)?

A. There is foreign matter of some nature in there, yes.

Q. It is the same color as the other?

A. I wouldn't be able to answer that statement because this is the same color as the walls. I wouldn't know whether it was foreign or not.

Q. I see. Did you dig that hole that was approximately that deep in yours?

A. I did not. [205]

Q. How deep did you dig yours?

A. I didn't dig any kind of a hole, I simply scratched it. I scratched it to see if it would come out easily after that beating, and scratching

(Testimony of Elmer G. Coffey.)

wouldn't shake it out easily, there is no further use to dig any holes in it. You would have to beat it out, that was my theory.

Q. That was your theory.

The Court: I think that, perhaps, should be withdrawn now that we have seen it here. Because it is not deactivated, I don't want the Clerk handling it.

Mr. Tugman: Perhaps we could consign it to one of our demolition experts tomorrow to dispose of it properly.

The Court: Well, just don't leave it here.

Mr. Tugman: Yes.

Q. Now, you state that your hobby is guns and making bullets and that type of thing?

A. That is true.

Q. And in that respect, do you handle quite a bit of ammunition, quite a few bullets, and so on?

A. Yes, I have handled lots of ammunition.

Q. And in handling ammunition, what is your usual practice in regard to ammunition and bullets?

A. In what respect?

Q. Well, assume, Mr. Coffey, that you had a bullet you didn't know whether it was exploded or not exploded, [206] what would you do with it?

A. Put it in my collection.

Q. You would put it in your collection. Would you put a live bullet in your collection?

A. That is what the collection consists of.

Q. Would you put a live shell in your collection if you knew what the live shell was?

A. What do you mean by a shell?

(Testimony of Elmer G. Coffey.)

A. Well, this bomb here, if you knew the bomb was alive?

A. We were speaking of cartridges, not shells. I don't have any shells in my collection, just cartridges.

Q. If you had known that the Plaintiff's Exhibit No. 1 was live at the time you picked it up, would you have put it in your collection?

A. Certainly not. I would have no place in my collection, to begin with.

Q. I understand that you have another bomb at home, is that correct? A. That is not correct.

Q. Your brother-in-law testified that you had a bomb or a mortar shell or something at home.

A. I have had a mortar shell. It is down in the car now.

Q. Do you know that bomb or mortar shell has been deloused or deactivated? A. I do. [207]

Q. You do. You know that it has been?

A. I know nothing about mortar shells. I have been told by my son that brought that to me from Dutch Harbor that it was deactivated. It is possible to screw it all to pieces and look at all the inside of it. Therefore, I believe it is deactivated.

Q. But you don't know?

Q. And it isn't in my collection.

Q. Pardon? A. It isn't in my collection.

Q. Where do you keep it?

A. It sits on top of the bookcase.

Q. I see. But there is a possibility, is there not, that that bomb is still active?

(Testimony of Elmer G. Coffey.)

A. There is no possibility that it is still active, no. The cap in the end of it has not been exploded.

Q. The cap in the end has not been exploded?

A. That is true. That was pointed out to me by Lieutenant Jackson when he visited me.

Q. Now, have you made any effort to decontaminate that cap? A. I certainly have not.

Q. Why haven't you?

A. Because I don't consider it dangerous and, furthermore, I wouldn't know how to do it. [208]

Q. How much experience have you had in fire-arms, Mr. Coffey? A. What is it?

Q. How much experience have you had with fire-arms? A. I have handled them all my life.

Q. And you don't consider a cap of that nature dangerous at all?

A. A cap in a shotgun shell, would you—I am supposed to answer your question. No, I don't, of that type, from what I know of them. I don't know anything about that cap. That is one reason I didn't try to do anything with it. I wouldn't know whether that cap is dangerous or not, but a cap of that size in a cartridge wouldn't be particularly dangerous.

Q. Now, when you were scratching the hole in that bomb, did you use your finger nail in trying to get that stuff out? A. Finger?

Q. Yes, your finger.

A. I don't believe so, I couldn't recollect that.

Q. Are you sure you didn't use your finger first and then try and scrape some out?

(Testimony of Elmer G. Coffey.)

A. I had gloves on at the time, I doubt very much if I used my finger in any operation.

Q. I see. Do you remember talking to Commander Call sometime [209] just after the accident?

A. I talked to him, I remember talking to him, yes.

Q. Do you remember telling him that you first used your finger and then an iron bar to try and pry some of the material out of the hole?

A. Could be, and it is possible that I might have done so.

Q. I see. And do you still say that you weren't successful in getting any of that material out?

A. I didn't get any material to speak of out of it.

Q. You got about a third of a—

A. Third of a teaspoonful, perhaps, as I recollect. That is a long time ago and it is hard to figure that out. Not enough to be satisfactory, I should put it that way.

Q. Mr. Coffey, you must have read some of the advertisements and articles in the papers and heard over the radio communications advising people of bombing areas around there?

A. I not only didn't read any of that prior to the accident, I haven't been able to find one since the accident.

Q. Ever listen to the radio?

A. Not very often, I am too busy.

Q. You have never heard of any such items at all? [210]

A. I have been told they have been on the radio.

(Testimony of Elmer G. Coffey.)

Friends of mine have asked me once or twice if I heard a radio broadcast about something shortly after they had learned I had hurt my hand with the bomb, but I, personally, have never heard or read in any paper anything relating to bombs. Except pictures, that I have seen pictures of bombs, but you are speaking of warnings to civilians, aren't you?

Q. Yes.

A. I have not heard or read at any time any warnings to civilians on the bombs other than what went with one of these discoveries that it notes in the paper.

Q. Now, surely, you knew of the existence of the local bombing range near Pasco, did you not?

A. How would I know of the existence of a bombing range? I am asking questions again, I'm sorry. I did not, no, the answer is no.

Q. You seem to have gotten an awful lot of information about this bombing range since your accident, is that correct?

The Court: That is argumentative. Sustain the objection to that.

Mr. Loney: If you mean did he write his congressman—— [211]

Mr. Tugman: I have no further questions.

The Court: Any redirect examination?

Mr. Loney: Well, no, I think not at this time, your Honor, anyhow.

The Court: I think it is time to suspend now, then. Court will adjourn until 10 o'clock tomorrow morning.

(Whereupon, the trial in the instant cause was adjourned until 10 o'clock a.m., March 1, 1955.) [212]

Walla Walla, Washington—March 1, 1955

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to wit.)

The Court: All right, proceed.

Mr. Loney: When we finished last evening, your Honor, Mr. Coffey was on the stand. I didn't examine on redirect, but I don't think there is anything further that we need bring out. Therefore, I rest.

The Court: All right.

Mr. Tugman: You rest, counsel?

Mr. Loney: Yes.

(Plaintiffs Rest.)

Mr. Tugman: At this time, the government moves to renew its objections to the introduction of certain material in this case on the ground there has been no basis laid for the introduction of any of the testimony concerning other bombs or fragments of bombs purportedly found in the vicinity of Benton City. There has been no showing that any examination has been made of these items to show their actual [214] nature. There has been no showing as to their origin and there has been no showing as to any identity of the location from which they came

with any certainty at all. And on the basis that there has been no connecting evidence whatsoever to show how those bombs got there, if they are bombs; on the basis that their location when they were found has not been established, we renew our objections and move that all the evidence in that respect be stricken.

The Court: The motion will be denied.

Are you ready to proceed, Mr. Tugman?

Mr. Tugman: Yes, I am.

The Court: All right.

Motion to Dismiss

Mr. Tugman: At this time, if the Court please, the government moves again to dismiss the plaintiffs' case on the basis that the plaintiff has not sustained his cause of action as stated in the complaint. It is the contention of the government herein that for the government to be liable, according to the terms of the complaint, the plaintiff must sustain the burden of proof, which we feel he has not met, of showing that the United States Government, through the Department of the Navy, or through at that time the then United States Navy, negligently dropped a 13-pound practice bomb on a certain ranch and caused the injury to the plaintiff.

Now, we submit that this is not a case where *res [215] ipsa loquitur* applies. I think it is alleged in plaintiffs' complaint that *res ipsa loquitur* does apply. In that respect, I cite the case of *Clark vs. the City of Bremerton*, which is 97 Pacific (2d), 112.

I do not have the Washington citation. It is a Washington case where the court states:

“Where an injury is the result of a way in which an instrumentality was used, and the injured party is himself the actor, the doctrine of *res ipsa loquitur* is inapplicable.”

Now, in this case the plaintiff has brought in his own testimony that the plaintiff Coffey by his own actions detonated this bomb. There could be no dispute about that.

Under the rule of the Clark case, and I think under the well settled construction of the rules of *res ipsa loquitur* under a situation of this nature where the plaintiff is himself the cause of the injury to himself, or some act of the plaintiff is responsible or in some way a part of that injury, the doctrine of *res ipsa loquitur* does not apply. That doctrine assumes that the instrumentality was in the exclusive control and possession of the defendant. That situation, patently, is not present here.

If, then, the doctrine of *res ipsa loquitur* is ruled out in a case of this kind, then it becomes [216] necessary, by the theory of the government in this case, that the plaintiff must show plain negligence. To show that negligence on the part of the government, we contend that it is necessary that the plaintiff establish that the United States Navy did, in fact——

The Court: You needn't spend any time on that. I will concede that they haven't shown directly any negligence; they haven't proved that Pilot X got

out of the area and dropped a bomb. It would only be by *res ipsa loquitur* that they could establish their case, so you needn't dwell on the question of direct negligence. There hasn't been any proof of it.

Mr. Tugman: That is true.

The Court: Yes, all right. So we don't want to take up any more time than we have.

Mr. Tugman: It is our contention, your Honor—I am citing just that one case——

The Court: I might say this, Mr. Tugman, while I don't want to unduly restrict you here, it is a settled policy in the Federal Courts that where there is any doubt about it at all, particularly in a case before the court, it is preferable to get all the testimony in and then argue the legal points after it is all in. And if you argue now exhaustively your legal points, and if I deny the motion, you are going to have exactly the same points and the same [217] argument to make again this afternoon when you finish. I hope you finish this afternoon.

Mr. Tugman: Yes, your Honor.

The Court: And I prefer to have you make a record. Your witnesses are here sitting around, why not have them testify? Then we will hear your argument and the Court will decide it.

Mr. Tugman: Yes, your Honor.

The Court: I think there is enough, at least reasonable doubt in the Court's mind here, that I should have all the testimony. And the Court of Appeals prefers it that way, because if I decide it now and they say, "Well, you have got too much ahead here. We would rather have this on all the

record and all the testimony." They have said that in a number of cases.

Mr. Tugman: Yes, your Honor.

The Court: Where the Court decides the case when the case is only half in.

Mr. Tugman: I think your suggestion is well taken. I don't want to argue it twice.

The Court: I think I get your point, I think there is an issue on *res ipsa loquitur* here.

Mr. Tugman: Yes.

The Court: But I prefer to have your testimony and then we will argue. [218]

Ruling on Motion to Dismiss

With that thought in mind, reserving your right to renew the motions at the close of all the evidence, the Court will deny them now.

Mr. Tugman: That is true. Thank you, your Honor. Mr. Dickey.

J. B. DICKEY

called and sworn as a witness on behalf of the defendant, was examined and testified as follows:

Direct Examination

By Mr. Tugman:

Q. Your name is J. B. Dickey?

A. That is correct.

Q. And your rank is what?

A. Chief Warrant Officer, U. S. Navy, at this time.

Q. Beg your pardon?

(Testimony of J. B. Dickey.)

A. I have to clarify that slightly. At this time, I am acting in the capacity as the 13th Naval District Explosive Ordnance Disposal Officer for the United States Navy.

Q. Where are you stationed, Mr. Dickey?

A. At the Naval Ammunition Depot, Bangor, Washington.

Q. What are the duties of your particular job?

A. To dispose of or to inert any dangerous objects or munitions of any explosive or a chemical or of like [219] nature, pyrotechnics, and so on, in a manner that will prevent injury to enlisted, or you might go as far as to say any person.

Q. Civilian or military?

A. Civilian or otherwise.

Q. What training have you had, Mr. Dickey, in ordnance matters, bombs and other explosive materials, as used by the Navy?

A. I have been in the U. S. Navy since 1938, and in connection with that, I have been around ammunition, had control of it, and you might say fired it, preserved it, and inventoried it, and so on.

Q. Have you had any specific training in matters of ordnance? Have you gone to any schools?

A. Yes, I have attended several courses of instruction. In 1938, I attended a class, an ordnance school, which covered all types of ordnance equipment and also included fire control and electrician's mate, and I attended a course of instruction at the U. S. Naval Gun Factory, which covered all types of modern weapons and equipment and fire control

(Testimony of J. B. Dickey.)

used therein, and I also have attended the Explosive Ordnance Disposal School located at the U. S. Naval Powder Factory, Indian Head, Maryland. And I have also attended the Special Weapons Disposal School located at Indian Head, Maryland. [220]

Q. Now, in your capacity as a disposal officer, have you had occasion to decontaminate, if I am using the proper word, quite a lot of ordnance?

A. Quite extensively, yes. I was located on Okinawa shortly after the second world war and we did disposal work quite extensively in cleaning up the island, and so on. This, however, was before my course of instruction at Indian Head, Maryland. However, I was acting in the capacity of a gunner at that time, I was a warrant officer, as I am now, and we were called upon—I was located at the Naval Ammunition Depot on Okinawa—and we were called upon to dispose of and collect quite a large amount of ammunition, and some of that ammunition was in a fused and serviceable condition, had been previously fired, and so on.

Q. Since your course of training at Indian Head, have you had occasion to pursue this work further?

A. As I previously mentioned, I have been since 1950 in explosive ordnance disposal work, and I have had occasion to decontaminate, as you mentioned before, quite a few items of explosive ordnance.

Q. I might ask you, Mr. Dickey, what is the proper word? Should I say “decontaminate,” or what should I say?

(Testimony of J. B. Dickey.)

A. Well, that is as good a word as any.

Q. Are you familiar with the type of ordnance used in the [221] Naval and Army Air Service?

A. I am. In addition to my being the 13th Naval District Explosive Ordnance Disposal Officer, I am connected with the Naval Ammunition Depot located at N.A.D., Bangor, and, in addition to that, I am the Magazine Stowage and also the Magazine Gunner located at N.A.D., Bangor.

Q. Showing you Plaintiff's Exhibit 1, have you seen this object before?

A. Yes, I have.

Q. Would you please tell us what it is?

A. It is a 13-pound Mark-19 A & N practice bomb.

Q. What do you mean by that terminology?

The Court: Is that No. 1 that you have there?

Mr. Tugman: Yes, your Honor.

A. That is a piece of equipment used by both the Army and Navy for practice drops from high altitude. High speed drops from a high altitude only.

Q. What are the characteristics of this particular bomb?

A. Would you clarify that?

Q. Well, let me go back a minute. You said this bomb is used in dropping at high altitude. Would you please explain what you mean?

A. It is to be dropped from horizontal aircraft at 6,000 feet or above, and it is to be used against light [222] armored vehicles or can be water drops or it can be dropped on land.

Q. I see. Is it used in other types of drops, that

(Testimony of J. B. Dickey.)

is, dive bombing or skip bombing, that type of bombing?

A. No, it cannot be, due to the fact that it would be, as in this case, it would be a dud, is what we call a dud.

I will clarify that, meaning that it still has explosive contained therein. It would not detonate, due to the fact that the force of impact would be in a side motion and would not shear the shoulders in the piece of equipment. Therefore, the detonator holder would not reach the primer cap.

Q. In other words, for this bomb to explode, it must hit upon its nose, is that correct?

A. It must hit upon its nose or receive a force of motion upon the base of the primer cap, which is a Winchester primer cap, that is, in normal operation. However, it has been brought out that a force of motion applied by a blunt instrument against the detonator holder or the use of, you might say, a nail or rod, steel rod or anything, against the primer cap, will detonate it.

Q. Is there any limitation on the speed in which this bomb can be carried in an aircraft?

A. The speed should be approximately 250 [223] knots.

Q. In terms——

A. A knot being a mile and one-eighth.

Q. A mile and an eighth? A. Yes.

Q. In other words, about 300 miles an hour?

A. That is about correct, yes.

Q. What speed, Mr. Dickey——

(Testimony of J. B. Dickey.)

Mr. Loney: Excuse me just a moment.

I wonder if this line of testimony is material, your Honor, as to the speed it should be carried at? I don't quite see its materiality.

The Court: I don't see the materiality of it.

Mr. Tugman: If the Court please, I am trying to show that the practice ranges in the Richland area, or I will show the practice ranges in that area were used entirely and exclusively for dive bombing and for skip bombing purposes. There was no high altitude bombing in that area, and I am trying to show that this particular bomb was not carried in planes flying 6,000 feet level flight, of which there were none operating in that particular area.

The Court: All right.

Mr. Loney: If this witness is qualified to answer those questions, your Honor, but I don't think—well, I will object to the question.

Mr. Tugman: I will qualify him a bit further, then, [224] counsel.

Q. Mr. Dickey, the information concerning this 13 pound practice bomb, where do you find information on that?

A. We have several sources of information. The best and most accurate information is furnished by the Bureau of Ordnance in a bomb aircraft pamphlet. In other words, a pamphlet we call an ordnance publication 1280 gives all the correct information, the weights and the type of equipment it is used against, and the types and the formation, manufacture, specifications, and so on.

(Testimony of J. B. Dickey.)

Mr. Tugman: If the Court please, I would like to have this item placed in evidence. Now, it is a confidential Navy publication and I don't want to mark it if I can help it. It is a little bit difficult to——

The Court: Well, I don't know. Is that classified material?

A. Yes, it is classified material.

The Court: Well, if it is classified material, you can't admit it in evidence. You might have the witness testify as to that part of its contents which you wish to disclose and then, if it is necessary, if it is questioned, why, the Court can in chambers examine the document with counsel.

Mr. Tugman: Yes, your Honor. [225]

The Court: That is sometimes done.

Mr. Loney: Your Honor, if you would like, I am not waiving my objection to its materiality, but if counsel is allowed to introduce it, it could be the pertinent portion could be read right into the record.

The Court: Well, that, unless—are there parts of it that can be disclosed without violation of the classified restriction?

A. I believe that would be satisfactory. I see no reason why the small portion in connection with this——

Mr. Tugman: Pertaining to the 13 pound practice bomb could not be disclosed?

A. That's right.

(Testimony of J. B. Dickey.)

Mr. Tugman: I wonder, then, your Honor, if we could just have the witness read this portion? It is a very small portion.

The Court: Yes, with counsel reserving the right to make any objection to it other than its authenticity. Is that acceptable, counsel?

Mr. Loney: Yes, your Honor. I would like to object on the basis that it is hearsay testimony. I don't think it is proper that anyone introduce a book.

The Court: What is this book, Officer?

A. It is the manual that we use for information on our bombs and aircraft bombs, and so on. [226]

The Court: It is an official Navy publication?

Mr. Tugman: I would expect to qualify the publication, your Honor.

The Court: Well, all right, he may read from it, then, the record will show the objection.

Mr. Loney: All right, your Honor.

Excuse me just a minute. Do I understand this is not a Navy rule or regulation of any kind, it is merely information that the Navy publishes, is that right?

A. It is published for the uses of the services, yes.

The Court: As technical information?

A. As technical information.

The Court: Yes.

A. Yes.

Q. (By Mr. Tugman): And this book is an official Navy publication? A. Yes.

(Testimony of J. B. Dickey.)

Q. I wonder if you would please read the portions of that book concerning the 13 pound miniature bomb, Mark-19 Mod.?

A. Which would you like for me to read? Right here?

Q. Yes, right there, if you would.

A. (Reading): "The use of this bomb is for use in high altitude, horizontal bomb practice, and may [227] be used against armored-deck target boats having 20 pound S.T.S. half-inch armor deck, provided the altitude at release does not exceed 6,000 feet horizontal altitude after release."

Q. Now, Mr. Dickey, is there anything in that publication which concerns the speed that that bomb can be carried on an aircraft? A. Yes.

Q. Would you please read that portion?

A. (Reading): "The maximum speed of release at dive bombing attacks against these targets and boats must not be exceeded in 200——"

I have digressed here, this is the small 4.5 miniature. I don't believe that it mentions in here other than one bomb is carried in the Mark-46—or Mark-461. Therefore, it doesn't mention the speed in connection with the 13 pound bomb.

Q. I see. Now, Mr. Dickey, what are the characteristics of this 13 pound practice bomb? How is it made up and what are its components?

A. Well, it is made up of zinc-alloy composition and it has a fixed—the vanes, the tail vanes are fixed, you might say, a sheet tin or sheet steel material, and [228] it contains a detonator holder and

(Testimony of J. B. Dickey.)

an A & N, what we call an A & N Mark-4, as I clarified before, Army-Navy Mark-4 cartridge contained within the body.

Q. Perhaps you can testify and identify these exhibits here as you go along as to the components here.

A. Yes.

Q. Handing you Defendant's Exhibits 12-C, 12-A and 12—

A. This is the Mark-19 practice bomb and is made of an alloy composition, zinc-alloy composition, and, as a matter of fact, I drew this bomb from the Naval Ammunition Depot's stock to show what a complete round would be. This is a detonator holder (indicating) and it contains the detonator in the small projection here, which upon release and striking the ground, strikes against the primer cap contained in the A & N Mark-4 signal.

Q. What material is that detonator cap made out of, Mr. Dickey?

A. It is made of the same material, an alloy composition, very soft alloy composition, as is the bomb itself.

Q. As is the bomb?

A. Yes. This is the retainer pin and is taped in upon shipment, and so on, and upon assembly the pin itself is inserted to the Mark-4, is inserted in the inside here and rests upon shoulders contained about two inches [229] down within the recess here and it is inserted in the nose end. The detonator

(Testimony of J. B. Dickey.)

holder and you might call it a carrier, too, is inserted in the practice bomb, the retaining pin is inserted and then is peined over on the sides here to contain the pin so it will not come out. That is an assembly for dropping.

Q. Now, how is the bomb detonated?

A. The bomb is detonated upon impact.

Q. Concussion?

A. Concussion, correct. As in the case of a more familiar object, upon firing a cap from, in this case, a shotgun, the similarity is that it is a shotgun shell and it has the same type of primer, percussion-type primer, as a shotgun shell.

Q. Now, how much force does it take to set off one of these?

A. Quite a force when applied in the dropping of it.

Q. Is this type—pardon me.

A. I will go a little further. The dropping action takes place due to the projectile, you might call it, the practice bomb, which, striking the ground, tends to drive the detonator holder up, and the force of motion being applied in a downward position, causes the cartridge to come down and meet the detonator holder and shears the shoulders contained within the small bomb [230] and it strikes the base of the primer.

The Court: It is the momentum of the cartridge when the thing stops?

A. It is the momentum.

The Court: Carries it on?

A. Carries it on.

(Testimony of J. B. Dickey.)

The Court: The reverse of the gun when the pin goes; in this case, the cartridge comes down?

A. Correct, sir. The purpose of this is to create a signal for spotting. In other words, the mixture contained within this A & N Mark-4 cartridge is a pyrotechnic composition on top of a black powder composition and is ignited by a percussion, a Winchester percussion cap, and it creates a spot so that it can be observed and photographed from the air to observe your effect of target practice by bombing.

Q. (By Mr. Tugman): Now, is this bomb liable to go off on casual handling; that is, if it were dropped from an elevation of three, four, five feet, if it liable to go off?

A. No, but using a normal precaution, that is, normal care, and so on, in the handling of this, it can be loaded and it can be treated the same as a shotgun shell or anything of that nature. By observing normal care, the projectiles can be loaded and then inserted for flight [231] in an aircraft and what not and they are perfectly safe, perfectly safe meaning the cautious handling of any piece of loaded equipment. Just like a loaded revolver, you handle a loaded revolver very carefully.

Q. In other words, it takes an external force administered to the bomb to set it off, is that correct?

A. That is correct. Either through some use of some exterior means by pounding with an object or either by the normal procedure of this bomb being dropped out of an aircraft.

(Testimony of J. B. Dickey.)

Q. Now, Mr. Dickey, in the course of your work, have you had occasion to go on any bombing ranges and that type of thing?

A. No, not so much on bomb ranges. The joint responsibility covered in the explosive ordnance disposal operations governs this in the fact that I am the Disposal Officer for the 13th Naval District, and the area of my responsibility is that I will take care of all explosive items up to and including the high water mark of the ocean areas, the lakes and rivers governed within the different Naval Districts. In this the 13th Naval District covers Washington, Oregon and Idaho, and any objects found within these localities, the Navy Department will take care of, and this includes also the Naval establishments. In the case of explosive ordnance disposal responsibilities, the area of responsibility, as you say, these bombing ranges, and so on, if they were within the Naval control would be cleaned and taken care of by Navy personnel. However, the explosive ordnance disposal is taken care of by the Army or the Air Force. They are responsible for zones, you might classify them, for the disposal of all items found on land and within private dwellings, and so on, of that nature, and also to include the former bombing ranges, and so on, held by the Navy and then returned to private ownership.

Q. I see.

Mr. Tugman: You may examine.

The Court: Is this the same type of practice bomb that is used by the Air Corps, do you know?

(Testimony of J. B. Dickey.)

A. Yes, this is the same type.

The Court: I don't know since the reorganization whether the Army still operates planes and does practice bombing.

A. That is correct. I might——

The Court: The Army uses it, too, then?

A. Yes.

The Court: I see. Well, that is all I have in mind. Mr. Loney, you may go ahead. [233]

Cross-Examination

By Mr. Loney:

Q. Mr. Dickey, in connection with the last statement that you just made, actually, under your division of responsibility, the cleaning up of ordnance in the area around Mr. Coffey's residence and around the Tri-City area is the function of the Army disposal group?

A. That is correct, unless the property is still within the control of the Naval Service, and then we will be called in to take care of it.

Q. And, in other words, as between you and Sergeant McCammon, who is here today, his responsibility is to clean up that area and yours is to handle anything dropped at sea or up to the high water mark, is that right, in the State of Washington?

A. That is correct. Also, Naval stations and Naval air stations, and so on, held by the Navy.

Q. Such as Sandpoint Naval Station?

(Testimony of J. B. Dickey.)

A. That's right. However, as I stated before, this zone of responsibility only came into effect about 1951. Before that time, the Navy was called in quite often to take care of the disposal of items that were found.

Q. I suppose you, yourself, have never been called in on this particular range that is in question?

A. No. I have never been called in on the Benton County [234] ranges.

Q. You had a map that you furnished to Mr. Tugman which we used. Is this classified information? Can it be——

Mr. Tugman: Counsel, Captain Smith furnished that map.

Mr. Loney: Oh, excuse me.

A. Yes.

Mr. Tugman: I believe.

Mr. Loney: It is your own personal map, Captain?

Captain Smith: Well, no, I borrowed it from the airport manager.

A. Oh, yes, it wouldn't be classified, then, I don't believe.

Captain Smith: No, sir.

Q. (By Mr. Loney): I am wondering if you would mind, Mr. Dickey, in stepping down here to this map? Perhaps it could be done at a recess. Let's do it that way and save time. Excuse me for bringing you down here. We can do it at recess.

A. All right.

(Testimony of J. B. Dickey.)

The Court: I was going to suggest that if you want to use the document in evidence here, it can be returned after the case is concluded.

Mr. Loney: Would that be satisfactory, Captain Smith?

Captain Smith: What is that? [235]

Mr. Loney: If we introduce this in evidence and then return it to you as soon as the case is concluded?

Captain Smith: Yes.

Mr. Loney: Fine.

The Court: What I mean by concluded, the time for appeal expires or the appeal has been decided in the Court of Appeals.

Mr. Loney: All right, sir.

The Court: It doesn't mean when we get through here.

The Clerk: Plaintiff's Exhibit 15 for identification.

Q. (By Mr. Loney): Is there any portion of that book that I can look at without being out of line?

The Court: I think he said it wasn't classified.

Mr. Loney: No, the book, your Honor.

A. No. The book is classified, yes.

The Court: I thought you were still talking about the map.

Q. (By Mr. Loney): Is there any portion of it relating to those—I believe there are about four types of practice bombs, the four pound, six pound, 13 pound and 100 pound?

(Testimony of J. B. Dickey.)

A. Yes, that is correct.

Q. Am I right? A. Yes.

Q. The information in your book relating to those objects, [236] is that classified?

A. Yes, it would be classified.

Q. And it wouldn't be permissible, then, for me to see the material on the four pound and the six pound practice bomb?

A. Well, it is not for general publication to the public as a whole. It is of a restricted nature for the use of the Armed Forces only, you might say.

Q. Well, I presume that I shouldn't look at it, then.

Mr. Tugman: Mr. Dickey, would that be of any different nature than the 13 pound bomb?

A. I don't think so, too much.

Mr. Tugman: Counsel apparently wants to look at that, I would have no objection. I can't say whether it is restricted or not.

The Court: Well, I suppose the Navy is the same as the Army, there are different grades of classification?

A. Yes.

The Court: And this is a low-grade classification, I think.

A. Yes.

The Court: It would be proper for counsel to see it so long as it isn't given out for publication? There is no reporter here.

A. That is satisfactory with me. [237]

(Testimony of J. B. Dickey.)

The Court: It wouldn't be given general publicity.

Mr. Loney: You just pick it out for me and I will look at it afterwards.

A. Yes. You were interested in this (indicating)?

Q. Yes. A. This one here?

Q. That is a four pound bomb?

A. Uh-huh, four pound, and then it goes to 13 pound, and so on.

Q. Are they all loaded with shotgun shells?

A. Yes, they are, they are all of the same type.

Q. And are they all made of a lead compound?

A. No, they are not, there is several different types. I am surprised at the fact that there hasn't been several different types submitted here, because previous to World War II we had aluminum practice bombs of a smaller nature, say the three and four pound, we had those, and later on during the war this was a sort of a strategic material, this material here, and they used a steel or an iron composition, small practice bomb. However, the openings, and so on, the type of cartridges and everything, were the same, similar nature. They might have been a little different due to the modifications of it, say the difference in pyrotechnical material, and so on, would change the marks and mods. [238]

Q. You were reading something about speed in there. What bomb did that relate to?

A. This one here (indicating) I was reading about was the two pound. I believe you was inter-

(Testimony of J. B. Dickey.)

ested in bombing target boats having 20 pound, the maximum release elevation was 2,500 feet.

Q. Well, now——

A. Or not dive bombing in excess of 290 knots.

Q. Correct me if I am wrong, but isn't this the circumstance as to that material that you were reading from the book, that is for information in telling you how you can handle those type of bombs against a certain type of target, for instance, a ship that is armored with a certain thickness of steel, and, therefore, the provision that it must not be dropped over 6,000 feet relates to the penetrating force that it might have when it struck that ship?

A. Yes. Due to the fact of the construction of this type of equipment, as I showed you before, it has a lead shoulder on there for shearing purposes. This is a safety factor, you might call it, so that if the bomb is dropped on an armored deck or steel deck or dropped on concrete or anything, it will not go off. There is a remote possibility that it will go off; however, the chances are very small. The bomb itself, I would like [239] to bring out the fact that upon receiving this information I was sort of curious and it is one of my duties to find out if certain things will take place, then I am forewarned and, as such, I am forearmed in the fact of handling these pieces of equipment.

I took a bomb of a like construction with the Mark-4 A & N signal and I proceeded to throw it against a concrete walkway of about a four-inch construction from a second-story platform and I

(Testimony of J. B. Dickey.)

threw it down at an angle, and I'm sorry I didn't bring the bomb, I could have shown you what happened to it. It tore the tail, the tail came off of it, and it dented the nose in here in a like manner as in Exhibit 1 there, and it did not fire.

Q. In other words, Mr. Dickey, if these objects were used and were dropped at an angle like this (indicating), the thing that you would expect to happen from your experiment is that the tail would drop off, break off?

A. That is correct.

Q. And that the object would not fire?

A. That is correct. It could very easily still be a dud. So if we found it in that condition, we would be sort of suspicious of the fact it was loaded.

Q. Well, you heard the testimony of Sergeant McCammon and you have no reason to think that his testimony is [240] incorrect to the fact that he has picked up quite a few of these objects or seen quite a few of them on the range out there?

A. Yes, I have no doubt, I know there is quite a few scattered around out there.

Q. Then, it is very possible, isn't it, Mr. Dickey—

Mr. Tugman: I would like to clarify that. I think he said he picked them up on the range itself, is that correct? Is that where you were, on the bombing range?

Mr. Loney: Yes, and around it. I believe he drew a circle on the map to indicate the areas that he had found them.

A. Yes, I heard his statement, the fact that he did.

(Testimony of J. B. Dickey.)

Q. Then, it is very possible, isn't it, Mr. Dickey, that the Armed Forces of the government in using this bomb were using it the wrong way?

Mr. Tugman: I am going to object to that.

A. I couldn't say.

Mr. Tugman: Your Honor, I don't think the witness is qualified to answer that question as to whether they were using it the wrong way or not.

The Court: Well, he is an expert witness. You had him testify as such.

Mr. Tugman: I see.

The Court: I will overrule the objection. [241]

A. I don't believe that I could state the fact that it was dropped or it was not dropped, either, because I was not in this locality. And I know that the commanding officers of Naval ammunition depots, upon receipt of a letter from the commanding officer of any activity, will furnish them ammunition of his letter, providing it falls within the category that is governed by his allowance list. And there is times that the commanding officer has a special project to be carried out by being this nature, that is, a classified project for test of some equipment or something like that, he might draw something that he is not authorized to, but, however, he will have to have a letter authorizing him to do this.

The Court: I assume that you don't know, Mr. Dickey?

A. No, I don't know the procedure of that and I shouldn't bring that out.

(Testimony of J. B. Dickey.)

The Court: Well, what I started to say is you don't know of personal knowledge how the range was used near Richland, the Naval range?

A. No. However, from my predecessor, Lt. Commander Ridenour, I had a report, which is only hearsay and I don't believe should be submitted.

The Court: Let's not have it, then.

A. That it was—— [242]

The Court: Let's not have it.

A. ——that is, for practice range only.

Mr. Loney: I have no objection.

The Court: I will strike that as hearsay. Go ahead.

Mr. Loney: I have no objection, your Honor, if he testified to that, unless counsel has an objection to it.

Q. Lt. Commander Ridenour was the man who investigated this particular accident and went to Mr. Coffey's farm and talked to him and received this practice bomb, is that right?

A. Yes, that is correct.

Q. Well, now, let me ask you this question, Mr. Dickey: If the Naval forces or the Army had been using this range as a dive bombing range or a skip bombing range, and if they had been using this type of practice bomb, they would have been using it improperly, wouldn't they?

A. I believe so, yes. Therefore, you would find quite a large quantity of duds and you would find a lot of them that had went off. Because of the

(Testimony of J. B. Dickey.)

characteristics of this bomb, even though they come in for a skip bombing or dive bombing, if they were high enough and released at a certain altitude, they would tend to tumble and then straighten out in flight.

Q. And that might account for the fact that a lot of tail [243] fins were knocked off of them, wouldn't it?

A. Yes. The tail fins on this are very thin and this is, you might say, a pot metal, zinc alloy, and they could very easily be torn off.

The Court: How are they fastened on there, just slipped on?

A. Yes, they are molded.

The Court: Just molded on?

A. Just molded on when the bomb is manufactured. It is a form and it is molded right in there.

The Court: They nearly always come off when they are dropped from any altitude?

A. Yes, they do. Even the one that I tested for my own information, the tail was torn off of it.

Q. (By Mr. Loney): Have you had a chance to observe these exhibits that are 1, 2, 9, 10 and 11?

A. Yes.

Q. These objects are all portions of the particular bomb we are talking about, aren't they?

A. Yes, they are of all similar size.

Q. Did you have a chance to examine Exhibits 10 and 11? I think they fit together. In your opinion, you would say that is a part of the same piece, would you not?

(Testimony of J. B. Dickey.)

A. No, I couldn't certify the fact that they were of the same piece, even though they appear to be. They could [244] have been of two different bombs. It wouldn't necessarily have to have been the same one. However, the fact is that they are of a certain size and this indicates to me that they came from this type of bomb here, or the Mark-19 bomb.

Q. Well, now, getting back to whether they are part of the same piece, I am not asking you to certify, I just want your opinion as to whether or not you believe those two pieces were at one time part and parcel of the same object. You examine that. If it would help, we could take the strings off of there. I think you will find it is a pretty close match.

A. Yes, I would say that they appear to be.

The Court: It would be a very unusual coincidence that they would fit together that way if they weren't?

A. Yes, it would be. However, we do find it occasionally.

The Court: I suppose you would.

A. We do find occasionally that they do fit together.

Q. (By Mr. Loney): Well, you will notice there are certain little things——

A. Serations in there.

Q. Serations that match?

A. That indicate that they do match, yes.

Q. And even little parts on the end here (indicating)?

A. Yes, that's right. [245]

(Testimony of J. B. Dickey.)

Q. And to be just almost identical. Well, would you compare this with that bomb right there and tell me about what portion of that bomb this piece would occupy?

A. Well, it would occupy a portion along here and along in this vicinity here (indicating).

Q. I wonder——

A. You would have to measure it, I presume, in order to find out exactly. I imagine you would have to use a par of calipers, I believe.

Mr. Tugman: I am going to object to this line of testimony. I don't see it has any materiality at all. In the first place, this identification has not been admitted as an exhibit. There has been no qualification as to its derivation.

The Court: You mean the complete bomb here?

Mr. Tugman: No, the little one, the pieces.

The Court: That is in evidence.

Mr. Tugman: I don't believe so.

Mr. Loney: Yes.

The Court: Yes, they are admitted in evidence. They are the ones that were identified by the deposition of the man in Oklahoma. He testified he picked them up at a certain place and what they looked like, and so on.

Mr. Tugman: I'm afraid I don't see the materiality of this, though, particularly. [246]

Mr. Loney: I will tie it up, I believe, your Honor.

The Court: Well, all right.

(Testimony of J. B. Dickey.)

Q. (By Mr. Loney): Would you mind marking just the part that you think just shows——

A. I would say approximately here and here (indicating).

Q. Now, may I examine this?

The Court: Is that in evidence?

The Clerk: No.

The Court: It is not, is it?

Mr. Loney: Counsel, are you intending to offer this?

Mr. Tugman: I have no objection to offering that.

The Court: What is the identification of that?

Mr. Loney: 12, your Honor.

The Clerk: 12.

The Court: If there is no objection, 12 will be admitted in evidence here. It can be withdrawn, of course, after the case is over.

A. It is not a new one.

The Court: Oh. Well, if it is any use to the Navy, they can get it back.

A. Yes.

Q. (By Mr. Loney): Mr. Dickey, you have marked a red line that goes over this sticker that is placed on Exhibit 12? A. Uh-huh. [247]

Q. And the portion of the bomb that you are describing, then, would be from the red line toward the tail fins on this Exhibit 12, is that correct?

A. It would appear to be, yes.

Q. And, turning it over, it would appear that

(Testimony of J. B. Dickey.)

that cross-section is about two or three inches of the lettering on this Exhibit 12?

A. Yes. However, the fact should be brought out that not all of our practice bombs have this mark and mod., due to being manufactured at different localities and under different conditions, and so on. This was marked with this Bureau of Ordnance letter. There is some of them that are not marked.

The Court: Pardon me. In order to keep the record straight here, these various parts of the whole practice bomb were identified on the cross-examination of Sergeant McCammon; as the Defendant's Exhibit 12, the 13 pound practice bomb; 12-A, the retaining pin; 12-B was the cartridge which was withdrawn for safety reasons; and 12-C, the retainer, that little—I think you call that, is that right? What do you call it?

A. Detonator.

The Court: The detonator?

A. Detonator holder.

The Court: All right: It seems to me that if one is [248] to go in, they all should.

A. Yes, they are integral parts of the practice bomb.

The Court: If there is no objection, they will all be admitted. To keep the Clerk's records straight, 12, 12-A and 12-C will be admitted.

A. They are interchangeable.

The Court: All right, proceed.

(Testimony of J. B. Dickey.)

(Whereupon, the said objects were admitted in evidence as Defendant's Exhibits 12, 12-A and 12-C.)

Q. (By Mr. Loney): I think you had just finished telling us that actually not all the bombs were marked with this mark?

A. That is correct, yes.

Q. And that since this portion that is shown by Exhibits 10 and 11 came from the same place where the marking appears on Exhibit 12, you would expect markings to appear on Exhibits 10 and 11, would you not?

A. Not necessarily.

Q. Well, you would either expect them to be there or you would expect that this bomb had not been marked?

A. Yes, that is correct, I would expect it not to be marked. As has been brought out, some are marked and [249] some are not.

Q. Handing you Exhibit 2, would it appear to you that the way this end is encrusted, that it had been dropped from a fairly high altitude or at a fairly high rate of speed?

A. I would say that it had, yes, due to the fragmentation of the practice bomb and also——

Q. The imbedding?

A. The imbedding of the material in the detonator.

The Court: What number is that?

Mr. Loney: Exhibit 2, your Honor.

A. This probably took place by landing on a rock

(Testimony of J. B. Dickey.)

or something of a similar nature caused a shattering effect.

Q. If it would strike a rock, then——

A. It would shatter.

Q. And that probably was fired because of the way it struck? A. Yes, drove it up in.

Q. Is it the striking the rock itself or the explosion, or what is it that causes it to shatter like this?

A. Well, it is of a shatterable nature. Then it could very easily have happened due to the force of motion, either by striking a rock or by landing upon a solid enough surface to cause it to.

Q. Referring to Exhibit 1, now am I correct that once you [250] put this pin in the end of the bomb, you then must do something to the bomb to seal the pin in there?

A. You lead it over. In other words, you take a small hammer and peen it over so that it retains the pin in there and it won't drop out.

Q. And this would make the pin less easy to see, wouldn't it?

A. Yes, I presume. However, if you look in the end of it, you would see the pin there.

Q. But if you did have material in the end, you might not see it then? A. That is correct, yes.

Q. Well, if this had been dropped and not exploded, your opinion would be that perhaps it hit some soft sand or something or material that gave and didn't get the force necessary to explode it and, consequently, it became a dud?

(Testimony of J. B. Dickey.)

A. Yes, it could hit on an angle, hit on an angle that way (indicating) in a soft material, and not detonate it.

Q. I suppose, actually, it could hit an angle straight down, if the material were soft enough, couldn't it?

A. No, these could be detonated from a high enough altitude by hitting on water or anything of that nature.

Q. I see. Just so the blow is solid on the [251] end?

A. That's right, and the motion, the force of motion being applied, it would.

Q. But if the blow is at an angle, then you don't——

A. Then you don't get your correct motion from it.

The Court: Is it true, Mr. Dickey, that where in service or practice ammunition, that there is always a certain percentage of defect which will cause duds, even when it is handled properly?

A. That's right, yes. You have your human element, we call it human element, which accounts for a percentage of failures; duds, in other words. That is due to manufacture, faulty manufacture or construction, and so on.

Q. (By Mr. Loney): And if you add to that factor you already have the fact that the bomb might be dropped on an angle, that would lead you to believe there would be more duds than normal?

A. That is correct, yes.

(Testimony of J. B. Dickey.)

Q. You have no reason to think that all of those exhibits which are portions of a bomb have not been dropped from an aircraft or some high altitude object, have you? A. Well——

Mr. Tugman: I am going to object to that. I don't think that that is right, I think that is——

The Court: I think that question is objectionable. You might ask him if, from the information he has, he has [252] any opinion about it. The fact that he hasn't any reason to believe differently, I don't think would be proper. You can ask him if he can express an opinion as an expert.

Q. (By Mr. Loney): In your opinion as an expert, would you tell me whether or not you believe these were dropped from an airplane or similar object?

A. Yes, I could say with reasonable certainty that they were dropped from an aircraft.

Mr. Loney: No further questions.

The Court: Do you have any further questions, Mr. Tugman?

Mr. Tugman: Yes, I do.

The Court: I thought we might get through with this witness before recess. Are you going exhaustively into redirect?

Mr. Tugman: No, your Honor.

The Court: All right.

Mr. Tugman: I just have a few questions.

(Testimony of J. B. Dickey.)

Redirect Examination

By Mr. Tugman:

Q. Showing you Plaintiff's Exhibit 2, counsel asked you if the material in the end of this bomb could not have ben forced in by dropping.

A. It could have been forced in by dropping. The [253] assumption was that it was dropped from an aircraft.

Q. Could it have been forced in by lying in a gulley or something of that nature washing into it over a period of time?

Mr. Loney: I think that is just a little bit leading, your Honor.

The Court: Yes, that is quite leading.

Mr. Tugman: Well, I think as an expert witness——

The Court: Well, you are not supposed to lead your own expert. He is your witness, you are not cross-examining him.

Q. (By Mr. Tugman): Is there any other way in which this material could have gotten in here?

A. Yes, there is.

Q. How?

A. By any weighty object or anything else hitting against that, say a rolling stone or anything like that, due to the action of water or anything. The same as a hammer, you can drive a nail through a piece of wood, but you don't normally find it. Unless it is driven through there, you don't

(Testimony of J. B. Dickey.)

expect it to get through there, and the same would take place here if, say, rolling stone or anything like that, due to the force of the water hitting against that and it being wedged in a manner, it would drive it in, and it is very [254] possible.

The Court: Your opinions are based on probabilities, though, aren't they, not possibilities?

A. Not possibilities, in as much as we have found material driven in to items before of a similar nature.

The Court: What I had in mind, if you see foot prints along the sand, you assume someone walked there?

A. Someone walked there.

The Court: Not some acrobat walked there on his hand with his shoes on his hands?

A. No, that is correct.

Q. (By Mr. Tugman): You have seen ordnance, though, that has been encrusted from just lying about? A. Yes.

Mr. Tugman: I have no further questions.

The Court: Do you have anything further, Mr. Loney?

Mr. Loney: There is just one thing, your Honor.

Recross-Examination

By Mr. Loney:

Q. You heard Mr. Coffey testify that he struck it about four times and it went in quite a ways?

A. Yes.

(Testimony of J. B. Dickey.)

Q. Would you then asume that he was driving it from the small end? [255] A. Not necessarily.

Q. He could have been pushing the cap on through?

A. He could have been pushing it on through against the shoulders. If you will examine this unloaded one here, you will see—see, the shoulders are down there (indicating), and he could have been driving it on through against those.

Q. I see what you mean. Could it have been fired driving it the other way?

A. Yes, it could have very easily.

Mr. Loney: That is all the questions I have.

The Court: It could be fired either way, either by punching the shell against—

A. Yes, your Honor, it could by hitting the primer in there.

The Court: All right, then, court will recess for 10 minutes.

(Whereupon, a short recess was taken.)

Mr. Dickey: Did you want me to stay?

The Court: No, no, if counsel has no objection, the witness who just testified, Mr. Dickey, may be excused.

Mr. Loney: Yes, your Honor.

Mr. Tugman: Yes.

(Witness excused.) [256]

Captain Smith.

E. B. SMITH

having previously been sworn, resumed the stand on behalf of the defendant, and testified further as follows:

The Witness: Must I be sworn again?

The Court: No, you have already been sworn, just sit down.

Direct Examination

By Mr. Tugman:

Q. You live in Kennewick, Captain Smith?

A. Yes.

Q. You were a Captain in the United States Naval Reserve, retired? A. Yes, sir.

Q. How many years of Navy service have you had?

A. Well, I have had a total of 37, including active and inactive.

Q. Would you please describe what the nature of your service with the Navy was?

A. Well, that would be quite a long story.

Q. Well——

The Court: Only that part of it that might be pertinent here, is all we are interested in.

Mr. Loney: I will admit the Captain's qualifications. [257]

Q. (By Mr. Tugman): Captain, you were in command of the Pasco Naval Air Station for a period of time, were you not? A. Yes, sir.

Q. What were those dates?

A. I planned the station, beginning in January,

(Testimony of E. B. Smith.)

1942, put it into commission July the 31st, 1942, and retained command of it until August the 23rd, 1944.

The Court: Do you call that the Pasco Naval Air Station?

A. It was the Pasco Naval Air Station, yes, your Honor.

Q. (By Mr. Tugman): Showing you Plaintiff's Exhibit 8, would you please point out on that map the location of the Pasco Naval Air Station?

A. This is—the other map.

Q. Benton County, the one I want is here.

The Court: You want 15.

Mr. Tugman: The maps have similar lines to me.

Q. Plaintiff's Exhibit 15, will you please point out the Pasco Naval Air Station?

A. Right here (indicating).

Q. What were the characteristics of that air station, Captain?

A. Well, that air station originally was built for primary training. [258]

Q. What do you mean by primary training?

A. Well, that is where the Naval aviation cadets were given their initial training, they become embryonic aviators.

Q. What type of activities were carried on at that station?

A. Well, until November 1, 1943, it was primarily for primary training, no military activity, just flying activities.

(Testimony of E. B. Smith.)

Q. Just flying activities. And after that date, what kind of activities?

A. At that date, the station was converted over to the training of carrier air groups, combat aircraft for the Navy.

The Court: I didn't get the date?

A. November 1, 1943, sir.

The Court: Thank you.

Q. (By Mr. Tugman): While you have that map there, I will digress for a minute. There are other areas blocked out on that map. Would you please explain what those areas are?

A. Well, all of these areas were outlying flying fields that were used in connection with the primary training.

Q. Were any of those areas blocked out on that map used for the purpose of bombing?

A. Well, when the conversion of the station was made, 10 [259] of those areas were used for bombing targets of various kinds of bombing.

Q. Now, which areas were those?

A. Well, I'm not so sure that I can recall every one of them. I recall that this was one, this was one, this was one, that was done, this was one, and this was one (indicating).

Mr. Loney: Excuse me, Captain, I am wondering if they have numbers on them? I wonder if you could refer to the numbers?

The Court: Yes, that would make a better record.

(Testimony of E. B. Smith.)

A. Yes. Well, No. 13, No. 3, No. 4, No. 7, No. 9, No. 10, No. 5 and No. 6.

Q. (By Mr. Tugman): Now, what were the other areas blocked in there that you haven't named, what were those used for?

A. Those were outlying flying fields.

Q. Planes landed and took off from those?

A. Practice landings.

Q. Practice landing fields?

A. That's right.

Q. What type of bombing activities were carried on on those fields that you mentioned?

A. Well, there was dive bombing——

Q. I will relieve you of this. [260]

A. ——using miniature practice bombs; there was glide bombing using 100 pound water-filled bombs; there was skip bombing using 100 pound water-filled bombs. I think that is all of the various types of bombing that was done there.

Q. What was the nature of that bombing? What type of bombing did they do?

A. Well, in dive bombing, a good dive bombing run is one where the plane comes down at 70 degrees to the horizontal and aims the airplane at the target and releases his bomb.

Q. Were those operations confined to any particular type of bombing?

The Court: Any particular type of what?

Mr. Tugman: Of bombing.

A. Well, they were always using miniature practice bombs only.

(Testimony of E. B. Smith.)

Q. In other words——

A. The dive bombing, now.

Q. In other words, were the activities in that area confined to dive bombing or skip bombing?

A. Oh, yes, dive bombing and skip bombing.

Q. Out of the Pasco Naval Air Station, were any level flight missions flown?

A. Not for the purpose of dropping [261] bombs.

Q. Not for the purpose of dropping bombs. For any other purpose were they flown?

A. Oh, yes, they flew tactical training missions.

Q. And by that you mean formation?

A. Formation practice, yes.

Q. What type of miniature practice bombs were used in these operations, Captain?

A. In the dive bombing practice?

Q. Yes?

A. Well, I don't know the Mark number and the mod. number, but they were smaller than this one that you see here (indicating) that has been introduced in evidence.

Q. Showing you Defendant's Exhibit 12, was this type of bomb used? A. It was not.

Q. It was not used in the Pasco operations at all? A. No, sir.

The Court: Let's see, what is that number?

Mr. Tugman: Defendant's Exhibit 12.

The Clerk: 12.

Q. (By Mr. Tugman): Where were the length

(Testimony of E. B. Smith.)

of the runways at the Pasco Naval Air Station,
Captain? A. 4,400 feet.

Q. Is there any particular significance to the
length of those runways? [262] A. Yes, sir.

Q. Would you please tell us what the significance of that is?

A. When the Secretary of the Navy originally approved the construction of that air station, it was approved for the purpose of primary training and to be so constructed that it could be readily converted to the training of carrier air groups, and the length of the runways were established as those being necessary for carrier-type aircraft.

Q. That is the length of runway that a carrier-type aircraft requires? A. Yes.

Q. Now, are those runways long enough to support larger aircraft? A. No, sir.

Q. Were any larger type aircraft used?

A. No, sir.

Q. There were no B-17's or bomber-type planes used there at all? A. No, sir.

Q. Have those runways, to your knowledge, ever been changed in their length? A. No, sir.

Q. They are the same length today? [263]

A. Yes, sir.

Q. Do you know, Captain, what length of runway a bomber-type plane would need?

A. It would require 7,000 feet.

Q. I see.

A. That is, the type used during World War II.

Q. As I understand your testimony, no planes

(Testimony of E. B. Smith.)

requiring such length of runway were ever used on that airstrip, is that correct?

A. That is correct.

Q. Now, where did the planes come from that used the Pasco Naval Air Station?

A. The air groups were assembled at Naval Air Station, Seattle, and drew their equipment there, drew their airplanes and their other equipment at Seattle, and personnel were assigned there, then they were flown over to Pasco and began their training.

Q. Where did these planes pick up their ordnance?

A. You mean—they picked it up at Pasco.

Q. They picked it up at Pasco?

A. Yes, sir.

Q. Was there any reason they did not pick their ordnance up in Seattle?

A. Nothing to stop them, but it wouldn't have been regular.

Q. Why do you say it wouldn't have been [264] regular?

A. Well, because they are not supposed to be carrying loose ordnance around inside of an airplane, and they are not supposed to be carrying bombs hanging on a bomb rack and flying over populous areas.

Q. To your knowledge, Captain, did any of the other services use these bombing areas at all?

A. These bombing targets around the Pasco Air Station?

(Testimony of E. B. Smith.)

Q. Yes? A. No, sir.

Q. The ones that you have pointed out?

A. They did not.

Q. To your knowledge, did the Army Air Corps have any fields for bombing in the area?

A. Oh, yes.

Q. Where were those, Captain?

A. Well, they had one at Ephrata; here in Walla Walla; Pendleton, Oregon; Redmond, Oregon; Madras, Oregon. I think that is all.

Q. Did you have any arrangements with the Army Air Corps people as to flying zones or anything like that?

A. Yes, sir, we had an arrangement by mutual agreement with the Commanding General of the Second Air Force, headquarters, Fort George Wright in Spokane—his name is Major General Oles—Admiral Wagner, who was Commander Fleet Air, Seattle, and myself. [265]

Q. What arrangement was that?

A. In that section of the country out to the west and northwest of the air station, the Navy agreed that it would confine its flight operations under 6,000 feet and leave the Air Force or the Air Corps have the space above 6,000 feet.

Q. Was there any particular reason for that?

A. Yes, sir. The reason the Air Corps gave was they had a target called Saddle Mountain Target just north of Saddle Mountain and it was for horizontal bombing.

Q. By horizontal bombing, you mean what?

(Testimony of E. B. Smith.)

A. I mean that the airplane, at the time the bomb is released, is flying in a horizontal position.

Q. I see.

A. And they had a target north of there and in making runs on that target, they would have to square away for considerable distance before reaching the target area and they didn't want any dive bombers coming down through their flight pattern.

Q. I see. Now, subsequent to the time that you were in the Pasco Naval Air Station, you were stationed in Seattle, were you not? A. Yes, sir.

Q. And during that period of time, what was your occupation there? [266]

A. I was the Chief Staff Officer to Commander, Naval Air Bases, who was the immediate superior in command of the 12 Naval Air Stations that were located in the 13th Naval District.

Q. And in that capacity, did you have any connection with the Pasco Air Base?

A. Yes, sir. They conducted inspections of the Pasco Air Base, along with these other air stations, at periodic intervals.

Q. Were you familiar with the operations that were carried on there? A. Yes, sir.

Q. At that period of time. Now, Captain, are there any regulations or orders to your knowledge, or were there any regulations or orders during the time that the Pasco Naval Air Station was being used, which pertained to safety regulations of pilots carrying ordnance, live ordnance?

(Testimony of E. B. Smith.)

A. There is always orders and safety regulations.

Q. Would you describe what those orders were?

Mr. Loney: Excuse me, Captain, just a minute.

I would like to object to that, if your Honor please. I think that we are concerned here not with the orders, but perhaps with a violation of them. I don't think that that would be material as to the orders. I mean, the [267] orders that were given to the pilots, I don't think would be material in this action.

Mr. Tugman: If the Court please, I think they would be material to show the conditions under which Naval aircraft operated.

The Court: If they operated according to regulation, I assume, there may be some probative value or some inference that might be drawn. Although I don't know so much about Naval flyers, but I know about Air Corps flyers, it would be a violent assumption that they always obey regulations, but you may proceed with it. I think it might have some probative value.

Q. (By Mr. Tugman): Would you please state what they were?

A. Yes, we had station regulations.

Q. What was the nature of those station regulations?

A. Well, they involved the regulation of the various departments of the station. They were orders that were of a permanent nature.

(Testimony of E. B. Smith.)

Q. Were there any orders regarding the carrying of ordnance? A. Yes, sir.

Q. Did those orders specify as to how that ordnance should be handled by flyers?

A. In addition to station regulations, you have safety orders. [268]

Q. Yes?

A. That concerns the immediate handling of ordnance material. It involves the personnel who actually have their hands on it, how they handle it. The station regulations did prescribe that certain of those outlying fields were used for certain target purposes and they were enumerated in these station regulations. In other words, they were assigned for certain purposes, some of them for dive bombing, some for glide bombing, and some for skip bombing.

Q. I see. Now, did these regulations specify where ordnance should be dropped or how it should be used? A. Yes, sir.

Q. What did they say?

A. They simply say that those fields that are numbered on this map right here, a certain numbered outlying field was to be used for a certain type of bombing target and not for anything else.

Q. Did the station regulations have anything to say about the use of ordnance in areas other than those designated?

A. Why, certainly, it prohibited the dropping of ordnance anywhere except in those designated areas and approved areas.

Q. Now, Captain Smith, if ordnance had been

(Testimony of E. B. Smith.)

dropped in [269] areas other than the designated areas, would that have constituted a violation of those orders? A. Yes, sir.

Q. Were any such violations reported to you during the time that you were Commanding Officer, or have you heard about any in your capacity at Seattle? A. Never.

Mr. Loney: Excuse me, Captain. I think that is perhaps a little far afield, your Honor, and sort of a negative hearsay, whether the Captain has heard of any violation of orders.

The Court: I will sustain the objection to that.

Mr. Tugman: If the Court please, I think I can—I will ask another couple of questions here first.

Q. If any violations had been reported, Captain, would they have come to your attention?

A. Yes, I am sure they would have.

Q. It was part of your job? A. Yes, sir.

Q. I will ask again, then, did you hear of any violations of these orders?

Mr. Loney: Excuse me, Captain. I will make the same objection, your Honor.

The Court: Well, he may answer to prove at least he didn't know of any. [270]

A. I have no recollection of any violations ever having been reported while I was Commanding Officer of the station nor while I was Chief Staff Officer at Seattle.

Q. (By Mr. Tugman): I see. Now, Captain, in regard to these bombing areas, were any safety precautions taken as to the areas themselves?

(Testimony of E. B. Smith.)

A. Yes, they were posted, in accordance with instructions from the Chief of Naval Operations, and they were fenced, all of them were fenced with 3-strand barbed wire fence.

Q. What did these regulations require as to posting and fencing?

A. I don't remember at this time what the interval was that we posted around there.

Q. To the best of your recollection, what was the interval?

A. I would say it must have been around 200 feet, but I can't guarantee that.

Q. Were these operations carried out in respect to these areas? A. Yes, sir.

Q. Have you had occasion to visit any of these bombing areas since the war?

A. No, I haven't been actually on any of them, but there is one there, the one in Benton County, that I think [271] the sign is still there. It was some few months ago.

Q. I see. You have seen them yourself?

A. From the highway, you see it from the highway.

Q. I see.

Mr. Tugman: You may examine.

The Court: While I think of it, Mr. Loney, I was going to ask the Captain this: I think I was confused yesterday on Saddle Mountain, I think I had in mind Frenchman Hills up in Grant County. Saddle Mountain is in Benton County, isn't it, do you know, or Yakima County?

(Testimony of E. B. Smith.)

A. Your Honor, I don't know. Saddle Mountain runs east and west and is north of the Columbia River, and I was under the impression——

The Court: Oh, north of the Columbia?

A. Yes, sir.

The Court: Oh.

A. Yes, sir.

The Court: And Frenchman Hills——

A. Is on the northern slope of Saddle Mountain.

The Court: Oh, I see. Well, I was right after all, then. I get them confused with Rattlesnake Hills. Saddle Mountain on one side and Frenchman Hills up there near on the other.

A. On the northern side of Saddle Mountain.

The Court: Yes, I know where it is, then. [272]

Cross-Examination

By Mr. Loney:

Q. In making their approach to Saddle Mountain, these bombers came in from the south?

A. That is what General Olds told us.

Q. And they might have swung down, then, as far as below the Yakima River to make their approach; otherwise, you wouldn't be interfering with their flight pattern, A. That is correct.

Q. That sign that you mentioned, I think that was published in the newspaper awhile back, wasn't it? Do you recall that, Captain Smith?

A. Well, I think that we built a road out there from the highway that goes from Kennewick to

(Testimony of E. B. Smith.)

Prosser, an access road, and that access road was used by the public after the war ended as a short cut over to Enterprise, and the occasion which I think that you mention now was brought about by the railroad company closing that road to public use.

Q. Would this be the sign that you had in mind (indicating photograph)?

A. No, no, no, that one says "Navy Bombing Target."

Q. Captain Smith, you heard Sergeant McCammon's testimony yesterday?

A. Say that again, please. [273]

Q. Excuse me. You heard Sergeant McCammon's testimony yesterday about the fact that he had run across these bombs in the areas that are shown on Exhibit 8 and marked with his initials there? They are these areas that are shown with his initials (indicating).

A. Yes, but here is the target here (indicating.)

Q. I'm sorry, that is not correct.

A. The target is here, yes.

Q. Shown by his initials, and this area——

A. Those are my initials.

Q. Your initials?

A. That is where the target is.

Q. Well, these are his initials, Russell W. McCammon. A. Uh-huh.

Q. He indicated that he had found those objects in that area. You heard that yesterday?

(Testimony of E. B. Smith.)

A. Yes, I heard it. Did he say these objects or——

Q. I believe he said these objects, these practice bombs.

You also heard the testimony of Mr. Dixon who testified yesterday and he marked the map here to show the location where he had found these objects?

A. Yes, I heard his testimony, but I didn't see where he marked the map.

Q. If my memory serves me correctly, he said he had found them on the range, as well as these two areas that he [274] circled here (indicating).

The Court: I am not sure that I got your testimony as to how long you were in charge of the Pasco Station or Field, Captain?

A. It was from the time of its inception.

The Court: And then it was changed over to carrier plane practice?

A. On November the 1st, 1943. I continued in command until August the 23rd, 1944.

The Court: Oh, I see. Did it operate after that?

A. Oh, yes, sir.

The Court: Who was in charge after you left there?

A. Well, there was a Captain Shoemaker and a Captain Erdmann.

The Court: Were these fields used for bombing practice after that, after you left?

A. Yes, sir.

The Court: Do you know for how long?

A. Well, I presume they continued to operate (Testimony of E. B. Smith.) until the war in the Pacific, the shooting war, stopped.

The Court: That was about August, '45.

A. Yes, sir.

The Court: All right, go ahead, Mr. Loney.

Q. (By Mr. Loney): You are familiar with some of the things that they are finding every day around there? [275] A. No.

Q. I mean, do you hear about them?

A. No, except in this courtroom.

Q. Do you remember the article in the paper the other day about somebody found 100 pounds of T.N.T. out there in the area?

A. No, didn't see that. I saw where somebody found a land mine.

Q. Well, did you read the article in the newspaper about the boy that took his teacher a bomb the other day? A. No, I didn't.

Q. Well, isn't it possible, Captain Smith, that there is more ordnance on those ranges out there than just your miniature dive practice bombs?

A. Well, the water-filled bombs, when they hit, of course, they just kind of roll up in a ball, the sheet steel does. It is made of very light sheet steel and there should be tons of that out there. There should be thousands of the miniature practice bombs. Not this type, but the smaller type that was used for dive bombing.

Q. But those weren't made of lead, were they?

A. No, not to my knowledge. I have dropped

(Testimony of E. B. Smith.)

dive bombing type of practice bombs for many years and I never saw one made of this material until I came in this [276] courtroom.

Q. Is it possible, Captain Smith, that in your position as Commander of the Pasco Naval Station, you might not have been familiar with the type of ordnance they were using? Is that a possibility?

A. It is customary for the Commanding Officer to make weekly inspections, material inspections, and one of the departments to be inspected, of course, is the ordnance department and the magazines, and I never recall ever having seen one of these Mark-19 bombs.

Q. You are familiar with the type of aircraft that was being used by the Navy for dive bombing and skip bombing? A. Yes, sir.

Q. Would this be a fair statement, Captain Smith, that it is very possible that a man flying one of those ships could accidentally hit the wrong button and drop his load? A. No.

Q. It is not possible?

A. No. If you wish me to explain, I will, or do you just want me to answer questions now?

Q. Well, no, I will give you a chance to explain, but if a Navy pilot said it was possible to do that, you would say he was wrong?

A. In this instance, yes. [277]

Q. Now, what do you mean by this instance?

A. Well, the only type of airplane that we had on that station that was ever designed to drop a bomb from a horizontal position was the TBM and

(Testimony of E. B. Smith.)

the TBF. That was our torpedo planes and those airplanes originally came equipped with that Norden bombsight that you heard much about during the war as being that very secret, secret, secret business. And when they drew their airplanes from Seattle to come over here, those bombsights were removed from the airplane because the Navy no longer used horizontal bombing with that type of airplane, and the reason they didn't is because of improvements in the aerial torpedo which was more effective than the bombs. Improvements had been made where the torpedo could be dropped from considerable altitude and at much higher speeds than previously. So all their training over there with those TBM's and TBF's was geared to training these people to drop torpedos.

Now, of course, they didn't drop any torpedos over there, and when they reached that stage of their training, they flew the planes over to Whidbey Island and actually dropped torpedos over at Whidbey Island Naval Air Station.

Q. Captain, these aircraft, the agreement that you made with the General in Spokane called for their flying at [278] an altitude in excess of 6,000 feet?

A. That is correct, sir.

Q. And your altitude limitations were what, again?

A. Below 6,000 feet in that sector.

Q. In that sector?

A. Now, down at some of these other sectors, we could go anywhere we wanted to.

Q. You heard Mr. Dickey's testimony that these

(Testimony of E. B. Smith.)

bombs were to be dropped below an altitude of 6,000 feet? A. This type?

Q. Yes, you heard his testimony?

A. Yes, I heard it.

Q. Then, if the Army dropped the bombs there, they would be dropping them at an altitude in excess of 6,000 feet?

A. Well, 6,000 feet or higher, if they were dropping that particular bomb.

Q. These bombs could be dropped from almost any type of plane, could they not, any type of Naval aircraft?

A. I would think this bomb could be dropped from any type of Naval aircraft if it had the right bomb rack there to hold it.

Mr. Loney: No further questions. [279]

Redirect Examination

By Mr. Tugman:

Q. To clarify, Captain Smith, after you left the Pasco Naval Air Station, you went to Seattle for how long? A. Ten months.

Q. And during that period of 10 months, you had cognizance of all the operations at the Pasco Naval Air Station?

A. Yes, sir. That is, I personally didn't; the Commander had cognizance of them and I was his Chief of Staff.

Q. I see. Captain Smith, showing you Exhibit 12 again—I won't lift it up there, you can see it—

(Testimony of E. B. Smith.)

is there any particular reason why that bomb is smooth and machined like that?

A. Yes, I think there is a reason why that bomb is smooth. In horizontal bombing from any height, it is important that the ballistic of the bomb be consistent.

Mr. Loney: Excuse me, Captain, have you been qualified as an ordnance expert?

A. No, but I have been qualified as a bomber.

Mr. Loney: Bomber. Thank you.

A. Pilot.

Q. (By Mr. Tugman): Are you trained, Captain, in the characteristics of ordnance that you drop?

A. I should explain that I am a Naval aviator and Naval aviators, in order to get that designation, have to go [280] through this training, certain amount of training in ordnance, including bombing, the actual dropping of bombs.

Q. Are you trained in the characteristics of the bombs that you drop? A. Oh, yes.

The Court: Well, he may answer. I think he has answered about the reason it is smooth.

Mr. Tugman: I see.

The Court: So it will drop accurately.

Q. (By Mr. Tugman): Now, what were the characteristics of the bombs used in dive bombing and skip bombing?

A. The dive bombing ones are smaller, considerably smaller, than this, made of cast iron, all those

(Testimony of E. B. Smith.)

I have ever seen or ever used, and the surface could be rough.

Q. Why could the surface be rough?

A. Well, because the nearer the vertical that you drop this thing, the less the ballistics of the bomb has a factor or is a factor in the accuracy of the bomb.

Q. I see.

A. And cost, of course, is the big thing, for keeping the cost down.

Mr. Tugman: No further questions. [281]

Recross-Examination

By Mr. Loney:

Q. In other words, if you drop it straight down, it could be lots more rough?

A. It could be a cannon bomb, it could be a rocket, could be anything.

Q. And these, then, being smooth, you would expect these to operate better if they were dropped at an angle?

A. From a level flight. You see, in order to use the Norden bombsight, you must know the ballistics of the bomb, know the characteristics of the bomb, how much it is going to trail, just exactly what flight path it is going to follow. Now, in order for those to be consistent, they have got to be the same shape, the same size and the same weight the same degree of smoothness.

(Testimony of E. B. Smith.)

The Court: It has to follow a consistent trajectory?

A. That's right, your Honor.

Redirect Examination

By Mr. Tugman:

Q. Then, as I understand it, Captain, in the dive bombing operations and skip bombing, what is the method of aiming in those operations?

A. You aim the airplane.

Q. So that the ballistics of the bomb is not of great [282] importance?

A. No, it is not of great importance. The skill of the pilot is the big thing.

Mr. Tugman: I have no further questions.

The Court: Any other questions?

Mr. Loney: No, I think not.

The Court: That is all, then.

(Witness excused.)

Mr. Tugman: Defendant rests, your Honor.

(Defendant rests.)

The Court: All right. Do you have any other witnesses, Mr. Loney?

Mr. Loney: Yes, I would like to put on a short witness right after lunch, if your Honor please. Would that be all right. It might be a very short rebuttal, might not, I don't know.

The Court: Yes. Well, all right, you can wait

until after lunch if you don't have any extended rebuttal.

Mr. Loney: No.

The Court: It is too late to go into it now, anyway.

I think that we should have some understanding about time. I always have a time limit when there is a jury and I should treat myself as well as I do the juries, [283] I think. Would an hour on a side be sufficient in this case?

Mr. Loney: Fine, yes, your Honor.

The Court: That is, to be as a maximum time of argument.

Mr. Tugman: Yes.

The Court: Oh, yes, I assume you want your 15 in evidence here?

Mr. Loney: I think I offered it.

The Court: Plaintiff's Identification 15 has not been admitted in evidence.

Mr. Loney: I think I offered it.

The Court: And Captain Smith pointed out the bombing target areas there on it.

Mr. Tugman: And this identification back here, your Honor, I don't know quite what to do about it. It is the bomb that was picked up by the plaintiff yesterday from the bombing range from a friend of his. But the thing has a possibility of being——

Mr. Loney: That was withdrawn.

The Court: What was the testimony regarding that?

Mr. Loney: It was picked up——

The Clerk: I understood that plaintiff's attorney withdrew that last night.

The Court: Yes. [284]

Mr. Tugman: I want to take it out of the custody of the Clerk, but I wanted it to be before the Court as something to consider. I don't know quite how to do that without seeing the possibility of its being alive, which is the only reason we took it out.

The Court: Let's see, what does it look like here? It looks like the others, doesn't it, like No. 1?

Mr. Loney: Yes, your Honor.

The Court: And what was the testimony regarding this now? I haven't that clearly in mind.

Mr. Loney: Mr. Coffey got this from a friend of his just a few days ago who had gotten it from the range.

The Court: Oh, I see.

Mr. Loney: We were looking for one to bring to court.

The Court: Oh, I see.

Mr. Tugman: And picked it up from the range just a few days ago.

The Court: Well, I think since the Court has seen it here, the record may show it is generally similar in appearance to No. 1. Is that acceptable to counsel?

Mr. Loney: Yes, your Honor.

The Court: To Plaintiff's Exhibit 1, and then you may take it out because I don't want to take a chance on anything around here that it may not have been detonated. [285]

Mr. Tugman: Generally similar except for one

thing, and I don't know whether I am at liberty to point it out to the Court or not. That is the only thing I wanted it in for.

The Court: What is the difference that you have in mind?

Mr. Loney: Oh, this shows a pin, your Honor.

The Court: It shows the pin? Oh, I see, yes.

Mr. Tugman: In the missile, your honor.

The Court: Oh, yes. This Identification No. 14, the record may show it has the pin in place and visible in the larger end.

Mr. Tugman: Yes.

The Court: Of the bomb. All right.

Now, are there any other exhibits here, Mr. Granger, that have been identified and haven't been admitted? I just want to be sure that none have been overlooked.

Mr. Granger: No, your Honor.

The Court: 15 will be admitted now, that map. I think that was marked as Defendant's 15, wasn't it, or is it Plaintiff's?

Mr. Loney: I would like to have it defendant's exhibit because I don't know about it.

The Court: It is marked as Defendant's Exhibit 15 and I think that is what it is. It will be admitted. [286]

Mr. Tugman: Yes.

(Whereupon, the said map was admitted in evidence as Defendant's Exhibit No. 15.)

The Court: There are no other, you say, Mr. Granger?

The Clerk: That is all.

The Court: All right, Court will recess, then, until 1:30.

(Whereupon, the trial in the instant case was recessed until 1:30 o'clock p.m., this date.) [287]

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had, to wit.)

The Court: All right.

Mr. Loney: Will you take the stand just a moment?

J. B. DICKEY

having previously been sworn, resumed the stand in rebuttal on behalf of the plaintiffs, and testified further as follows:

Direct Examination

By Mr. Loney:

Q. Mr. Dickey, you have heard the testimony, I think, of the deposition yesterday, about the fact that these objects were found over three or four acres in extent. In your opinion, would that be consistent had they been dropped from an aircraft?

Mr. Tugman: I am going to object to that. I don't think he is an expert on anything but ordnance, he is not an expert on how aircraft drop them.

A. Should have asked Captain Smith that question. I don't feel that I am qualified to answer that. [288]

(Testimony of J. B. Dickey.)

The Court: Yes, all right.

Q. (By Mr. Loney): Do you recall making an observation about that fact earlier today just before lunch?

A. Yes.

Q. You did express an opinion?

A. I expressed an opinion, but it was my own personal opinion, the fact that——

Q. Very well.

The Court: All right.

Mr. Loney: That is all, sir.

(Witness excused.)

Sergeant McCammon.

Would it be permissible for me, your Honor, just to ask Captain Smith that question while he is right there and save the time of coming up?

The Court: Well, I think he should come up here where the reporter can hear him. It always one question leads to another and probably there would be some cross-examination. I think this witness may take the stand. [289]

RUSSELL W. McCAMMON

having previously been sworn, recalled in rebuttal on behalf of the plaintiffs, and testified further as follows:

Direct Examination

By Mr. Loney:

Q. Sergeant, you may have made this testimony earlier, but I wanted to be sure by way of rebuttal.

(Testimony of Russell W. McCammon.)

You are familiar with the objects that have been identified as Exhibits 1, 2, 9, 10, 11 and 12?

A. Yes, sir.

Q. And I believe, am I correct, did you testify yesterday that you found those objects or objects similar to those on the bombing range near Richland, as well as in an area adjacent to the bombing range? Am I correct?

Mr. Tugman: I am going to renew my objection to the introduction of this testimony without definite showing as to which objects were found, where and when and how.

The Court: Well, you may make it more definite, if you wish. The objects are the ones similar to those.

Q. (By Mr. Loney): I am referring to them specifically. They would be Mark-4 13-pound practice bombs.

A. Yes, sir, I have.

Q. And you have found those in that area near Richland, is that correct, sir?

A. Yes, sir. [290]

The Court: And when?

Mr. Loney: Oh.

Q. Could you tell us about when that was?

A. At various times.

The Court: Just a moment.

Mr. Tugman: Pardon me.

The Court: Did you have an objection?

Mr. Tugman: Yes, your Honor. My point is this, that, referring to the exhibit here, Captain

(Testimony of Russell W. McCammon.)

Smith testified this morning that these objects were dropped—I mean, there were several dive bombing ranges around here. Now, there has been no identification as to the exact area. I think that the witnesses should be required to identify with particularity the area.

The Court: Well, I think he is talking about the area that he marked on the other exhibit there, the other map. The witness marked an area that he said was the bombing range, did he not?

Mr. Loney: Yes, your Honor.

The Court: On—what is your exhibit there, that other map right in front of you?

Mr. Loney: Oh, it is that one. This is Franklin County, this has not been admitted.

The Court: Oh, I see. That is Exhibit——?

The Clerk: 8. [291]

The Court: Exhibit 8?

The Clerk: Yes, your Honor.

The Court: And I assume that the Sergeant is talking about the same area that he marked out on Exhibit 8; is that correct, Sergeant?

A. Yes, sir.

The Court: So that is the identification of the place marked out with his initials on it on this map, Exhibit 8.

Mr. Loney: Right here (indicating).

Q. As I understand it, there is only one bombing range in Benton County?

A. To my knowledge, that is the only one I have ever found.

(Testimony of Russell W. McCammon.)

Mr. Loney: That is all the questions I have.

The Court: Any cross-examination of this witness?

Mr. Tugman: I have some examination of this witness, although it wouldn't be proper cross-examination.

The Court: I beg your pardon?

Mr. Tugman: I have some examination of the witness, although it wouldn't be proper cross-examination.

there would be no objection?

Mr. Loney: No.

The Court: Make him your witness again for some [292] direct examination.

Mr. Tugman: Yes.

The Court: All right, go ahead.

The Clerk: Defendant's Exhibit 16.

Direct Examination

By Mr. Tugman:

Q. Showing you Defendant's Identification 16, will you please identify this object?

A. This is a 60 millimeter mortar round.

The Court: What is that? A 60 millimeter mortar shell?

A. Yes, sir.

Q. (By Mr. Tugman): Where did you first see that mortar shell, Sergeant?

Mr. Loney: Excuse me, your Honor, I would like to object at this time to any testimony con-

(Testimony of Russell W. McCammon.)

cerning this mortar shell. In the first place, I don't think it is proper surrebuttal; in the second place, I don't think it has any materiality in this case.

The Court: You are not opening up a new issue on surrebuttal here, are you, counsel?

Mr. Tugman: If your Honor please, I concede the validity of that point, but I did not learn about the information that I want testimony to be given about until after my case was closed today. Consequently, I claim it is [293] newly discovered evidence and is competent at this time to be introduced.

The materiality, I seek to show by it that this bomb was in a loaded condition, had explosive in it, was kept by the plaintiff, and has a bearing on the negligence of the plaintiff, which is in issue in this case.

Mr. Loney: I think that was all disclosed yesterday, your Honor. That is the mortar shell that his son brought back to him from Dutch Harbor.

The Court: Oh, I see.

Mr. Loney: I don't think it has any materiality in this case.

The Court: Well, he may testify about it. That is a mortar shell, isn't it?

A. Yes.

The Court: Has a live cap in it?

A. Yes, sir.

The Court: Got any other explosive in it?

A. Yes, sir, it has.

The Court: All right, go ahead.

Q. (By Mr. Tugman): Did you disarm that

(Testimony of Russell W. McCammon.)

shell this morning? A. No, I didn't.

Q. Did you disarm that shell?

A. I just took the cap.

Mr. Loney: Wait. Did you take the cap [294] out? A. No, I just took the base of it out.

Mr. Loney: You didn't take it out?

A. You gave it to me. Naturally, I didn't take it out.

Q. (By Mr. Tugman): Do you have the cap?

A. Yes, I have it.

Q. Do you have the cap with you?

A. Yes.

Mr. Tugman: This is Identification 16-A.

The Court: All right. I thought we were going to end this case instead of starting out all over.

Mr. Loney: I make the same objection, I don't think that is material. I hate to be put on the spot of having to meet it.

The Court: On the basis you know about it, I will let him go on.

Mr. Tugman: If the Court please, I am not trying to unduly prolong the proceedings, but this bomb was brought up yesterday, it was in court. If the bomb had been here, I would have gone through this yesterday, but I didn't learn until today that the Sergeant, as I understand it, deactivated or took it apart this morning and there was explosive material in it.

The Court: All right.

Mr. Loney: I would like the record to show that

(Testimony of Russell W. McCammon.)

I don't think counsel's statements will be verified by the [295] evidence.

The Court: You got the Exhibit 16-A, then?

The Clerk: Yes, your Honor.

Q. (By Mr. Tugman): Sergeant, when you took that missile apart, did you find any explosive material in it? A. Yes, sir.

Q. What quantity of explosive material did you find?

A. Well, I couldn't say, it is all around the edges or the walls of the projectile.

Q. Is there any way that that could have been detonated? A. No, sir, the fuse is inert.

Q. Is there a percussion cap in there or something that could have caused damage?

A. In the fuse?

Q. Yes? A. No, sir.

Q. Up in the nose of it here (indicating)?

A. No, that has been taken out.

Q. Was that there when you examined it this morning? A. No, sir.

Q. Is there any way that that could have caused any damage at all?

A. You mean in its present state?

Q. Yes, in the state before you took it apart?

A. No, other than this here (indicating). [296]

Q. What damage could that cause?

A. Well, it can cause quite a bit of damage. Enough power to blind a man or even take off a finger.

(Testimony of Russell W. McCammon.)

Q. What type of a blow, what type of action, would it take to set that off?

A. Not very much. That is heat sensitive, that explosive in this cap is very sensitive to heat, shock or friction. Maybe I can better explain it, the weight in this mortar round here going into a tube at various angles will detonate this. That is about the best way, I couldn't give you the drop test on it or anything like that. But this little cap here sets off a powder train which ignites increments which furnish the projection power for this round.

The Court: You drop those in a tube, don't you?

A. Slide it in a tube and its own weight detonates it.

Q. (By Mr. Tugman): Could that percussion cap ignite the explosive material which is inside the mortar?

A. No, sir, just the increments.

Q. In your opinion, Sergeant, is that a safe object to keep around? A. Not——

Mr. Loney: I am going to object to that, your Honor.

The Court: Well, he may answer.

A. No. [297]

Mr. Tugman: I have no further questions.

The Court: Cross-examination?

Mr. Tugman: Oh, pardon me, I will offer these in evidence.

The Court: All right, they may be admitted, 16 and 16-A.

(Testimony of Russell W. McCammon.)

(Whereupon, the said objects were admitted in evidence as Defendant's Exhibits 16 and 16-A.)

Mr. Loney: May the record show my objection?

The Court: They may be safely kept here apart that way by the Clerk, Sergeant?

A. I would keep this apart.

The Court: I mean if they are kept apart to keep them in evidence?

A. Yes. Of course, if somebody dropped something on it.

Cross-Examination

By Mr. Loney:

Q. Sergeant, this object (indicating), you did not remove this object, did you, this morning?

A. No, sir.

Q. I gave that to you, didn't I? [298]

A. Yes.

Q. And this is not dangerous to be kept?

A. Yes, there is explosive in there.

Q. Is there any way that that could be set off?

A. Yes, there is several ways it can be set off. Suppose somebody took it apart and dropped a match in it.

Q. Well, for the purposes of illustration to the Court, you are talking about the material that hangs on the sides of the wall there?

A. That's right.

Q. Cylinder wall.

(Testimony of Russell W. McCammon.)

The Court: Is that just a residue of the original contents?

A. Yes.

The Court: Most of it has been taken out, but some still adheres to the inside of the walls.

A. Am I at liberty to tell them how that is filled?

Mr. Dickey: Yes.

A. That is cast T.N.T. and that hasn't been soaked out, it looks like it has been chipped out. I mean, T.N.T. being very stable, I have seen, even without using a berilium tool, that is, a non-sparking tool, I have seen fellows do it. However, any spark or friction could ignite that.

Q. But as long as it was kept shut like that, it is [299] perfectly harmless, is it not?

A. Relatively so, yes.

The Court: Well, I think 16-A, that cap, should be withdrawn from evidence here because it is something that is possible to detonate if somebody drops something heavy on it.

The Clerk: We would have to send it up to the Circuit Court if it is appealed, and I wonder how it would be safe to do that.

Mr. Loney: I think so, too. I don't see the materiality of having any of this in evidence, the objects themselves. The powder from this nose part has been removed and that cap is like having a shotgun shell in evidence.

Q. Is that right? A. Yes.

Mr. Loney: If you had a shotgun shell, you wouldn't have a shotgun shell in evidence.

(Testimony of Russell W. McCammon.)

The Court: Well, I think that they have been fairly well described. That is a standard mortar shell. How would you describe it, Sergeant?

A. That is a 60 millimeter H.E. mortar round.

The Court: And that is standard ammunition, I suppose, isn't it?

A. Yes, it is. It is fused with 52 point detonating fuse. [300]

The Court: I think after the case is concluded, they should be withdrawn, because if the case is appealed, we don't want to have to send explosives to the Court of Appeals. I have been reversed by them several times, but I haven't quite got that mad at them.

Mr. Tugman: I think as long as a description of the object is there, I think that is sufficient.

The Court: Yes, I think that is sufficient.

Mr. Loney: It may be withdrawn, then, is that correct, your Honor?

The Court: Yes.

Mr. Loney: You may keep the cap, then.

The Witness: Thank you.

Q. You are not sure that hasn't been exploded?

A. Yes, sir, I am.

Q. You are sure?

A. If that was exploded, this wouldn't be here (indicating).

Q. I thought when you looked at it this morning, you weren't sure.

A. Well, here, I was looking (indicating). There

(Testimony of Russell W. McCammon.)

is a powder train that goes up to here which ignites the other fuse. It has been taken off, but your cap hasn't been exploded.

Q. Oh, I see. [301]

Mr. Loney: That is all.

Mr. Tugman: I have no further questions.

The Court: Did you have other witnesses? You wanted to call Captain Smith, I believe.

Mr. Loney: I will call Captain Smith.

E. B. SMITH

having previously been sworn, recalled in rebuttal on behalf of the plaintiffs, and testified further as follows:

Direct Examination

By Mr. Loney:

Q. Captain, the question I asked Mr. Dickey back there a minute ago, assuming that these objects were found scattered over an area of about three or four acres in extent, would that be consistent had they been dropped from a bomber?

A. I would say that if they were released as a salvo.

Q. Yes.

A. Either accidentally or deliberately, that the dispersal over a three acre area would not be unreasonable.

Mr. Loney: That is all the questions I have.

The Court: Do you have any questions?

Mr. Tugman: No questions.

(Testimony of E. B. Smith.)

The Court: That is all, then, Captain, thank you.

A. Thank you, sir. [302]

(Witness Excused.)

Mr. Loney: That is all, your Honor.

The Court: Are you ready to proceed with the argument, then?

Mr. Loney: Yes, your Honor.

Mr. Tugman: Yes, your Honor.

The Court: All right.

Mr. Tugman: If the Court please, I would like to renew my motions at this time.

The Court: Yes.

Mr. Tugman: But I assume that your Honor would prefer that I argue in conjunction with my closing statement, or would you rather I argued the motions now?

The Court: No, I think that they should be argued along with the argument on the merits, because they involve, at least in large part, the same issues of law that are involved in the merits.

Mr. Tugman: Then, I assume your Honor would withhold the decision?

The Court: Yes. You may renew the motions now and the record will show they have been renewed at the conclusion of all the evidence and the Court will reserve ruling until after the argument. You can conclude your argument on them if it is any different than your argument on the [303] merits.

Mr. Tugman: I see.

(Whereupon, Mr. Loney made an opening argument to the Court, during which the following proceeds are excerpts therefrom) :

Mr. Loney: I would like to at this stage move that my pleadings be amended to conform to the proof. My pleadings allege the Navy dropped them there and we believed up until the testimony at this trial that the Navy did drop them, and it seems to me the evidence is consistent that the Navy did drop them, but if the Court does find it was the Army, we would like that right to have the pleadings amended.

Mr. Loney: We forgot to stipulate as to Mr. Coffey's life expectancy.

Mr. Tugman: I agreed with you yesterday about that.

Mr. Loney: The age is 23.65 life expectancy, your Honor.

Mr. Tugman: That is agreeable.

(Following plaintiff's opening argument, the following proceedings were had) :

Mr. Tugman: If the Court please, first, I would like to object to any amendment of the complaint, object to the plaintiff's motion here. I would like to register at [304] this time my objection to amending the complaint.

The Court: Oh. Well, the very liberal rules are applied in that respect. We place the emphasis on the proof in modern trials, rather than on the pleadings.

I think since the evidence came in without objection, that the pleadings should be amended to conform with the proof, and that will be the Court's ruling.

(Following the conclusion of argument, the Court rendered the following oral decision):

Decision of Court

The Court: Lawsuits must be decided, as far as the factual issues are concerned, on probabilities, and the proof may be made either by direct or circumstantial evidence. Here, I think, as Mr. Loney has pointed out, the reasonable inference, and I think the only reasonable inference that could be drawn here from this evidence, which I shall not detail, is that these objects that were found in the gulley between the Livengood and the Wagner place, in the general area where this bomb which caused plaintiff's injury was, got there by being dropped from a plane and, without question, they are 13 pound practice bombs which are used only for military purposes by military departments, the Navy and the Air Corps and the Army. Of course, it is [305] possible that those objects may have been brought there, dropped by a hunter who found them too heavy to carry, but it isn't likely that they would have been imbedded three or four inches in the ground, all on the blunt end, as Mr. McKnight in his deposition said that he found these objects in that general area.

Having established that they came from a plane,

that they were military property, and in all probability they were dropped from a military plane, then, of course, we have the matter of establishing negligence, and I think the doctrine of *res ipsa loquitur* applies, because the government would have exclusive control of the bombs and the plane in which they were carried, and the bombs could not get there where they were on private property in a private field, away from any military area or bombing range, without negligence of some sort on the part of the operator of the plane. And I don't think it is necessary for the plaintiff here to show it was Pilot Smith or Pilot Jones or he was from the Navy or the Army or Air Corps. It is sufficient, I think, to show that it must have been under circumstances due to the negligence of some agent and employee of the government in one of the services, some pilot or bombardier, or both, that caused them to be dropped in that particular place, and I think it is a matter of common sense, as well as of law, that dropping and leaving objects of this kind [306] containing explosives in dangerous quantity is negligence.

Now, it is a rather puzzling thing how these practice bombs got there. I think that Captain Smith is a credible witness and I credit his testimony, and I can't believe, in view of that testimony, that these objects were dropped there by the Naval pilots or Naval dive bombers, because they are not the type that is used in dive bombing, and his testimony is that they weren't used in that area. But there is testimony here—of course, the Court will take judicial notice of it in the absence of it—that there were

other operations here, that the Army had a base, I don't know what it was called then, but it is now Larson Field near Moses Lake. They had a target area on Saddle Mountain. And the evidence here is that they were using level bombing, they were engaging in level bombing practice in which they would use this type of bomb, and if they began their runs as far south as the Yakima River in approaching this area on Saddle Mountain—I am not inclined to speculate and I don't think it necessary for me to pin point the service that might be responsible here—but for what it may be worth, my guess is that some Army bombers didn't get rid of their practice bombs over the target area and dropped them in this gulley and one salvo hit down there and one of them didn't explode. That, it seems to me, is a natural and logical thing to suppose that they [307] were dropped from a higher altitude than dive bombers would operate.

It isn't any great mystery that one of them didn't explode, because it is a matter of common knowledge that there are dud shells, both in artillery operation and bombing operation, as one witness testified here, because of the human equation. There are bound to be some imperfections in some of the most carefully manufactured ammunition.

Now, the much more difficult question, I think, much more difficult issue than that of deciding whether or not there is primary negligence established here on the part of the government, is that of determining whether or not there is contributory negligence that would prevent recovery. I think

that is much closer than the question of negligence. I think there is definitely a distinction here between this case, for obvious reasons, and the cases cited by government counsel where youngsters go on a military reservation or go on an artillery range and get into trouble there with unexploded ammunition, or where a person goes upon a military reservation, a trespasser, and carries away ammunition. Here these people had permission to hunt upon these premises. It is true that technically, perhaps, they didn't have any right to carry away things that they found there, but, obviously, these objects were abandoned [308] pieces of metal that were not used by the occupant of the land, and I don't think that the fact that they carried them off would be taken as a basis of denying recovery to the plaintiff here. I don't think there is any great difference, as I remarked during the argument, between this situation here and what it would have been if the plaintiff had found this metal and had tried to scrape the dirt off or to clean it in the place where it was found.

Now, contributory negligence, as primary negligence, is negligence under the particular and peculiar circumstances that are presented in the case at hand. What may be negligence in one situation would not be in another. If a person picked up an object such as this on a place that he knew to be a bombing range, of course, that would be negligence, if he treated this object the way the plaintiff did here. But people are not supposed to find heavy chunks of lead with explosives in them in a farm-

er's field miles away from any bombing range or a place where they would likely be found, and the standard that I have to apply here is what would the person of average, ordinary caution and discretion do? What would the ordinarily prudent man do or most likely do in this situation? And by that standard, I don't think I can say that the plaintiff was contributorily negligent.

The way in which this object was found, dirt in [309] the ends, there was no pin visible. It wouldn't be visible unless he scraped out more of the dirt than he did. There weren't any markings visible on it that it was a bomb. I am far from being an ordnance expert, but I am a veteran of two wars, I have seen a great many bombs of all sizes and descriptions on the ground as duds and in military dumps, and I have never seen anything like this. Of course, you wouldn't ordinarily in wartime see a practice bomb, I suppose, but if I had seen this lying in the field, I would have had no idea what it was. I would have been inclined to think it was some kind of a sounding lead or heavy sinker or something that was used for connecting cable, cable joint, or something of that sort. I wouldn't have been inclined to think that it carried concealed explosives.

So that I am obliged to find, I think, that there wasn't contributory negligence.

For the purpose of the findings, I think that I should find all of your claimed grounds of negligence here, Mr. Loney, but I think the dropping of the explosives, in the first place, off of a military

area and failing to mark them plainly, I think would be acts of negligence that would support recovery.

I might say also that another thing which the people that handle this ammunition knew or, in the exercise of ordinary caution, should have known, was that when those [310] practice bombs are dropped, that the one characteristic that in my judgment, would distinguish them as bombs, the tail fins, would readily become detached and in almost every instance would become detached when they are dropped from an altitude. I think one of the witnesses here, the Warrant Officer, testified that even dropping them from a second story platform would serve to detach the fins, and with the fins detached they look, as can be seen here, very much like a heavy piece of lead with a hole in the middle.

Now, the matter of amount of recovery is always a difficult one for me. I can sympathize with juries when I have that problem, and I do have it, of course, in these cases because jury trial is not permitted in a tort claims action against the United States.

Of course, it is obvious that the plaintiff has suffered a permanent physical injury and disability in the loss of his thumb. However, I don't believe that there has been shown here any direct pecuniary loss in his profession as a pharmacist. He has continued on, apparently, on the basis of at least 34 hours a week and has actually been given a raise in salary since this happened. It does result in disability and

pecuniary loss so far as his work as a farmer and sheep raiser is concerned, but as I remarked here, I think during the trial, we have to remember that I can't properly allow anything for the loss of his profits [311] because he hasn't lost his managerial ability; it is only his ability to do physical work to some extent that is involved. And I think these cases, care should be exercised to keep them, as the law provides, on a compensatory basis strictly, and that is what I shall endeavor to do here.

I think that, all things considered, an \$8,500.00 award would be adequate and reasonable, and, in addition to that, the out-of-pocket expenses of the plaintiff, which I believe consisted only of the doctor bill in this case, and costs, and the findings may be prepared and presented on that basis.

Court will adjourn now.

(Whereupon, the trial of the instant cause was concluded.) [312]

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

United States of America

Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals filed in the above cause, called for in Appellant's Designation filed May 5, 1955.

Complaint.

Summons with Marshal's return.

Motion for Summary Judgment.

Stipulation to dismiss Motion for Summary Judgment.

Order dismissing Motion for Summary Judgment.

Answer and Affirmative Defense.

Defendant's praecipe for witness.

Plaintiff's praecipe for witnesses.

Court Reporter's record of proceedings at trial.

Exhibits No. 3, 4, 5, 6, 7, 8, 13 and 15.

(Exhibits No. 1, 2, 9, 10, 11, 12, 12A and 12C under separate cover.)

Findings of Fact and Conclusions of Law.

Judgment.

Cost Bill.

Stipulation to Amend Judgment.

Order amending Judgment.

Order denying motion for New Trial.

Notice of Appeal.

Designation of Record on Appeal.

Order extending time for filing record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said District this 20th day of July, 1955.

STANLEY D. TAYLOR,

Clerk of said Court,

[Seal] By /s/ THOMAS GRANGER,

Deputy.

[Endorsed]: No. 14836. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Elmer G. Coffey and Mrs. Elmer G. Coffey, husband and wife, Appellees. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed July 22, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14836

UNITED STATES OF AMERICA,

Appellant,

vs.

ELMER G. COFFEY and MRS. ELMER G.
COFFEY, husband and wife,

Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Appellant, United States of America, intends to rely upon the following points on appeal of the above-entitled cause:

1. The evidence is insufficient to support the District Court's findings of fact, conclusions as to negligence, and judgment. Plaintiffs failed to meet their burden of proof, and the District Court erred in not granting the Government's motions to dismiss made at the conclusion of plaintiffs' affirmative case and at the conclusion of all the testimony.

2. The District Court erred in admitting evidence concerning the finding of bombs other than the one which caused plaintiff's injury.

3. The District Court erred in holding that there was negligence of the Government which was the proximate cause of plaintiff's injury, and in failing

to hold that the conduct of the plaintiff E. G. Coffey and of the Osborns was the efficient intervening cause of the accident.

4. The District Court erred in applying the doctrine of *res ipsa loquitur*.

5. The District Court erred in holding that the United States is liable under the Federal Tort Claims Act (a) for failure to mark practice bombs concerning their dangerous qualities; (b) for failure to post warnings concerning dangerous objects on property not owned or controlled by it; and (c) for the manner in which it constructs practice bombs.

6. The District Court's findings relating to negligence and the absence of contributory negligence are clearly erroneous.

7. The District Court erred in granting judgment for the plaintiff.

/s/ WILLIAM B. BANTZ,
United States Attorney;

By /s/ LESTER S. JAYSON,
Attorney, Department of Justice, Attorneys for
United States of America, Appellant.

[Endorsed]: Filed July 22, 1955.

